INSURANCE COUNSEL JOURNAL

PUBLISHED QUARTERLY BY THE INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor Emeritus* WILLIAM E. KNEPPER, *Editor*

Editorial Office
150 E. Broad Street
Columbus 15, Ohio

Executive Office
510 E. Wisconsin Avenue
Milwaukee 2, Wisconsin

Address all inquiries to Editorial Office or Executive Office

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

IT WAS with mixed emotions that I received the gavel from Arthur Blanchet, my able predecessor, and assumed the high office of President of this Association. The tremendous honor which had been conferred upon me as the ranking officer in this truly great organization was deeply appreciated. However, I realized the monumental task undertaken in attempting to guide properly the affairs of our Association during the coming year. As stated at Banff upon my inauguration, the position presents a great challenge, offering a real opportunity to serve our members and the industry with which we are so closely identified. It will be my fervent effort to meet that challenge and to justify the confidence placed in me.

Our Association has attained its respected and exalted position because of the spirit of cooperation inherent in its members. I am relying on this cooperation to make this year one of accomplishment. I solicit your personal comments as to how we may improve our Association and make it of greater value to the individual members and to the insurance industry. Your suggestions are welcomed as to how our committees may become more useful and effective. I would like your thoughts on our annual meeting and whether you think it can be improved. Are the programs the type you desire? What ideas do you have for making them more interesting and constructive? It will be my earnest endeavor to carry out your wishes to the end that our association will continue to enjoy an enviable position in the legal and insurance world.

Your continued support of our Journal is urgently needed. It is an excellent publication. Its present high standard can be maintained only if each of you participate in its work by contributing regularly current material and articles through the channels afforded for that purpose. There is no better way to serve your Association.

Twenty-two committees, with a total personnel of over four hundred members, have been appointed and are listed in this issue of the Journal. The majority of these committees have embarked on pertinent projects for the year. The importance of an early and well organized start in the work of the committee can not be overemphasized and is essential if its program is to be completed prior to the next annual meeting. Do not be satisfied with merely being a committee member but, rather, be an active and productive worker. The success of our Association can be measured largely by the aggregate of the attainments of our committees.

The luncheon in New York City each year during the annual meeting of the New York State Bar Association has become an institution within our Association. This outstanding affair will be held on January 30, 1960, at The Plaza Hotel. You will find this an enjoyable occasion, providing an opportunity to mingle and visit with a large number of your fellow members and their wives who gather each year for this function. Plan to be present and so indicate by advising Price Topping, the hard-working chairman of this event.

CHARLES E. PLEDGER, JR.
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CHARLES E. PLEDGER, JR., 925 Washington Building, Washington 5, D. C. Born Gilmerton, Virginia, August 24, 1904. Married Beryle Edmiston, October 5, 1935; three daughters, Lee, Lacy and Lynne. Received LL.B. The George Washington University, 1927; admitted to practice in the District of Columbia in 1927 and before the Supreme Court of the United States in 1930. Member of firm, Pledger, Edgerton & Richardson. Member of Bar Association of the District of Columbia; American Bar Association; Fellow of the American College of Trial Lawyers (Board of Regents, 1957--); Fellow of the American Bar Foundation; Lawyers Club of Washington (Secretary-Treasurer, 1947--); The Barristers (President, 1941-42); Theta Delta Chi Fraternity (National President, 1934-37); University Club of Washington (President, 1952-54); Columbia Country Club; Temple Noyes Lodge No. 32 F.A.A.M. (Past Master); Armed Forces Chemical Association (General Counsel, 1946--); Washington Board of Trade; The George Washington Law Association; National Interfraternity Conference (Chairman, 1951-52); Kiwanis International; The Newcomen Society in North America; Metropolitan M.E. Church. Member of Armed Forces, World War II, 1942-46; being Chief, Legal Branch, Chemical Warfare Service, at the conclusion of the War with rank of Major. Member of I.A.I.C. since 1941.

President-Elect

DENMAN MOODY, 1600 Esperson Building, Houston 2, Texas. Born San Antonio, Texas, January 11, 1909. Married Edna Lewis, August 22, 1930; three daughters, Teddy, Bebe and Rhetta; one son, Denny. Received LL.B. University of Texas, 1933; admitted to practice in Texas in 1933 and before the Supreme Court of the United States in 1950. Partner in the firm of Baker, Botts, Andrews & Shepherd. Member of State Bar of Texas; American Bar Association; Fellow of the American College of Trial Lawyers (Board of Regents, 1952-58); Houston Bar Association (President, 1956); Phi Delta Phi. Member of Army Air Corps, World War II, 1942-46, being in the Judge Advocate General's Department at the conclusion of the War with rank of Major. Member of I.A.I.C. since 1947.

Vice Presidents

J. H. GONGWER, National Masonic Building, Mansfield, Ohio. Born Mansfield, Ohio, May 13, 1898. Married Gladys Garber, December 28, 1925. Received AB, 1920, MA, 1921, Ashland College; attended law school Western Reserve University and Ohio State University; admited to practice, 1925. Member of firm, Gongwer, Larson & Murray. Member of Richland County Bar Association (Past President), Ohio State Bar Association, American Bar Association; Fellow of American College of Trial Lawyers; Mansfield Rotary Club (Past President); Mansfield Community Fund (Past President); Executive Committee, Ohio State Bar Association (Former Member); Negligence Committee, Ohio State Bar Association (Former Chairman); Accident and Insurance Committee and Bridge Committee, I.A.I.C. (Former Chairman); Member I.A.I.C. since 1945.

FRANKLIN J. MARRYOTT, 175 Berkley Street, Boston 17, Massachusetts. Born Jamesburg, New Jersey, May 11, 1903; married Stephanie VanBrakle Morris, June 19, 1926. Received Litt.B., Rutgers College 1925, LL.B., New Jersey Law School, 1928. Admitted to New Jersey bar, 1929; Massachusetts bar, 1940; Supreme Court of the United States, 1950. Teacher Middlesex County Vocational School, 1925-28; assistant to dean New Jersey Law School, 1928-30, fellowship, 1929-30, assistant dean, assistant professor of law, 1930-31, assistant professor of law 1931-39; associated with Liberty Mutual Insurance Company since 1931, counsel, 1943-48, general counsel, 1948--, vice president, 1952--; director, 1956--; general counsel Liberty Mutual Fire Insurance Company 1948--, vice president, 1956--. Member American Bar Association (Chairman, Insurance Section, 1951-52; House of Delegates 1952-53), Boston Bar Association; Chi Phi; Presbyterian Church; Wellesley Country Club (board of governors 1949-51; Rutgers Club (former President, N.E.). Member of I.A.I.C. since 1939.

Secretary-Treasurer

GEORGE McD. SCHLOTTHAUER, 20 North Carroll Street, Madison, Wisconsin. Born Madison, Wisconsin, September 21, 1902. Married Elizabeth Franklin; two children, Jane and George. Received B.A. from University of Wisconsin, 1925; LL.B. University of Wisconsin, 1930; admitted to Wisconsin Bar 1930. Member of firm of Schlotthauer & Jenswold. Member of American Bar Association, Wisconsin and Dane County Bar Associations; Phi Alpha Delta; Madison Club; Maple Bluff Country Club; Knights of Columbus; Gyro International; Member of I.A.I.C. since 1940.

Executive Committee

HAROLD SCOTT BAILE, 414 Walnut Street, Philadelphia 5, Pa. Born Philadelphia, Pa., December 31, 1912; graduated from Temple University School of Law; admitted to Pennsylvania Bar and the Supreme Court of the United States. Married Helen Bennett, 1939; one daughter, Pamela. Associate and member of Philadelphia law firm of Pepper, Bodine, Stokes and Hamilton from 1930 to 1951; January, 1951, became General Counsel of General Accident Fire and Life Assurance Corporation, Ltd., and Secretary of The Potomac Insurance Company of the District of Columbia. December, 1953, became Deputy General Manager and General Counsel of General Accident Fire and Life Assurance Corporation, Ltd., and Vice President and General Counsel of The Potomac Insurance Company of the District of Columbia. September, 1955, became Vice President, Secretary and General Counsel of the Pennsylvania General Insurance Company. January, 1957, became Vice President and General Counsel of Potomac Insurance Company (a Pennsylvania corporation). Member of Phi Delta Phi,

Juristic Society, Philadelphia, Pa., Philadelphia, Pennsylvania and American Bar Associations, Association of Life Insurance Counsel. Also a member of the Lawyers' Club and Down Town Club, Philadelphia, Pa. Member of I.A.I.C. since 1951.

WALTER HUMKEY, 401 Industrial National Bank Building, Miami 32, Florida. Born June 26, 1912. Married Rosemary Erskine, 1939. Undergraduate schools, Center College, Danville, Kentucky, and University of Florida; University of Florida College of Law; admitted to Bar 1939, both Federal and State Courts. Member of firm of Fowler, White, Gillen, Humkey & Trenam. Member of American and Florida State Bar Associations. Fellow American College of Trial Lawyers. Phi Delta Phi. Member of Riviera Country Club; Miami Club; Maritime Law Association. Member of I.A.I.C. since 1948.

F. CARTER JOHNSON, JR., 503 American Bank Building, New Orleans 12, Louisiana. Born New Orleans, Louisiana, October 21, 1905; married Josephine Mary Micheli; two children, Mrs. David B. Carse, Charles Berdine Johnson. Received LL.B. Tulane University 1927. Admitted to Louisiana Bar 1927. Partner in Porteous & Johnson. Member American Bar Association, Louisiana Bar Association and New Orleans Bar Association, (Executive Committee 1955-58). Episcopal Church. Delta Tau Delta. New Orleans Country Club; Stratford Club. Member of I.A.I.C. since 1937.

New York Mid-Winter Luncheon

The eighteenth annual mid-winter cocktail party and luncheon for all members of the Association and their families and guests will be held on Saturday, January 30, 1960, at the Hotel Plaza, 59th Street and 5th Avenue, New York, with the reception starting at 12:00 noon and the luncheon starting at 1:00 o'clock p.m.

As usual, notices will be mailed to all members in New York, New Jersey, Pennsylvania and Conneticut. Others desiring to attend should write to Chairman Price H. Topping, 50 Union Square, New York 3, New York, for reservations.

Serving with Mr. Topping on the permanent committee on arrangements are Milton L. Baier and Ernest W. Fields.

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

Edited by
R. Harvey Chappell, Jr.
Richmond, Virginia

AUTOMOBILE INSURANCE– INSURER LIABLE FOR FELON'S INJURIES

Davis v. Detroit Automobile Inter-Insurance Exch., 96 N.W. 2d 760 (Mich., 1959)

Insurer issued policy providing for medical payments for each person sustaining bodily injury caused by accident while the person was in the insured automobile. The insured's husband took the automobile in question and drove it to Ann Arbor where he committed a burglary and while attempting to escape with the loot taken from the burglary he wrecked the automobile and suffered injuries for which the recovery is sought. He subsequently was convicted of the felony of breaking and entering. The lower court concluded that the felon should not be allowed to recover inasmuch as this would serve as an encouragement to crime and would be contrary to public policy. On appeal, the Supreme Court of Michigan reversed and remanded the case for a new trial holding that the policy did did not provide a specific exemption for the insurer from liability for injuries sustained as a result of violation of law and, according to the court, such construction does not serve as an encouragement of crime nor is it contrary to public policy. Justices Dethmers and Edwards dissented.

CONFLICT OF LAWS– LIMITATION OF ACTION IN POLICY HELD TO PREVAIL OVER STATUTE OF THE FORMER STATE

Sun Insurance Office Limited v. Clay, 265 F.2d 522 (5 Cir., 1959)

Insured brought suit on a personal property floater policy in the United States District Court in Florida. The policy was issued and delivered to the insured in Illinois and at that time the insured was a citizen of and resided in that state. The premium was paid in a lump sum in Illinois. Under the terms of the policy suit was barred because of insured's failure to institute suit within 12 months next after he discovered the losses. Under the law of Illinois such a contractual provision was and is valid and enforceable. However, according to the law of Florida any stipulations in a contract which shorten the period of limitation of Florida (5 years) are illegal and void. The United States Court of Appeals for the Fifth Circuit held that assuming that a state might, if its connections with a foreign contract were sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, nevertheless, a Florida court could not, consonant with due process of law, strike down the period of limitation of action provided in the subject policy of insurance where the only Florida contacts with the policy where the presence of the insured property and the beneficiary in Florida at the time of suit. The judgment of the district court for the insured was reversed and the case remanded for entry of judgment in favor of the insurer. Circuit Judge Rives dissented.

DAMAGES– AGGRAVATION OF DAMAGES BY PHYSICIAN'S MALPRACTICE

Heims v. Hanke, 5 Wis. 2d 465, 93, N.W. 2d 455 (1958)

A pedestrian instituted suit for personal injuries sustained when he slipped on a sidewalk, the suit having been brought

against an automobile owner whose nephew had spilled water on the sidewalk while assisting the owner in washing the automobile. During the course of the trial the plaintiff testified that the attending physician had not properly set her wrist and also a statement had been made by counsel to the effect that a malpractice action was being brought against such physician. Therefore, counsel for defendant asked the physician on cross examination whether he or someone on his behalf had paid any amount to the plaintiff by virtue of such injury. The lower court sustained objection to each such question. On appeal, the Supreme Court of Wisconsin held that where personal injuries are aggravated by a physician's malpractice and it is impossible to separate damages resulting from each wrong, both the original tort feasor and the physician may be liable for the entire damage in which case payment made to the plaintiff by one will inure to the benefit of the other and require corresponding reduction of the judgment. However, in this particular case, although the defendant had a right to obtain the information as to the payment made to the plaintiff, nevertheless, inasmuch as the defendant's counsel did not sufficiently explain to the trial court the reason for such inquiry the judgment was affirmed. (Contributed by Richard S. Gibbs, Milwaukee, Wisconsin, Northwestern Regional Editor)

DAMAGES–
FAILURE TO AWARD DAMAGES FOR DEFLATED EGO UPHELD

Clegg v. Hardware Mutual Casualty Co., 264 F.2d 152 (5 Cir., 1959)

Insurer's truck ran into gasoline pumps of a roadside filling station causing fire and widespread destruction. Clegg was standing nearby but was not physically injured and was not touched in any way by anything. However, Clegg brought suit against insurer on the theory that on seeing this holocaust and the need for someone to rush in to help rescue victims he suddenly became overwhelmed by fear and realized for the first time in his life that he was not the omnipotent, fearless man his phyche had envisioned him to be. He alleged that his post-accident awareness of this event had destroyed his self-deceptive image of himself precipitating great emotional and psychic tensions manifesting themselves as psychosomatic headaches, pain in legs and neck, a loss of general interest, a disposition to withdraw from social and family contacts, and the like. In short, the medical theory was that the accident had made Clegg see himself as he really was, not as Clegg had thought himself to be and the accident had destroyed this myth. As the Fifth Circuit Court of Appeals observed:

> "It was, so the insurer argued with plausibility to the jury, the strange case of a defendant being asked to pay for having helped Clegg by bringing him back to reality–helping him, as it were, to leave Mount Olympus to join the other mortals in Baton Rouge."

A jury returned a verdict in favor of the insurer and on appeal the Court of Appeals affirmed. The court commented that if the claim is not bizzare it is an understatement to call it anything less than unique. To resolve this elusive and medico-psychic debate was the function of the jury and the court remarked that "They functioned right".

DISCOVERY–
OUT-OF-STATE PHYSICAL EXAMINATION OF PLAINTIFF ORDERED BY COURT

Reed v. Marley, 321 S.W. 2d 193 (Ark., 1959)

In a personal injury action the defendant filed a motion seeking an order requiring the plaintiff to submit to medical examination. The lower court granted the motion pursuant to an Arkansas statute which provides:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician selected by the petitioner. The order may be only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

The plaintiff was directed to submit to an examination by a physician in Tulsa, Oklahoma, with a provision whereby the defendant was to advance the sum of $35.00 to defray the expenses of making the trip. The plaintiff refused to submit to the examination and the lower court thereupon dismissed the suit. On appeal, the Supreme Court of Arkansas held that the lower court's order was appropriate but the dismissal of the complainant was remanded so as to give the plaintiff an opportunity to comply with the order. The court observed that the mere fact that one is required to go to an out-of-state physician is not, standing alone, unreasonable. Three justices dissented taking the position that it was an abuse of discretion to require the plaintiff to go to Tulsa for a physical examination.

EVIDENCE—
MATHEMATICAL FORMULA FOR MEASURING PAIN, SUFFERING, MENTAL ANGUISH AND DISABILITY INADMISSIBLE

Certified T.V. and Appliance Company v. Harrington, 109 S.E. 2d 126 (Va., 1959)

Plaintiff brought suit for injuries sustained when a shelf displaying television sets collapsed while plaintiff was a customer in defendant's store. In the lower court counsel for plaintiff, using a blackboard, presented plaintiff's damages for pain, suffering and mental anguish on a per diem basis according to a mathematical formula as, for example, 50c per day for traumatic arthritis. The jury returned a verdict for the plaintiff in the amount of $12,500.00.

On appeal, the Supreme Court of Appeals of Virginia reversed and remanded the case. The court held that the presentation and admission by the trial court of this evidence was improper and constituted error. The court stated:

> "To permit plaintiff's counsel to suggest and argue to the jury an amount to be allowed for pain, suffering, mental anguish and disability calculated on a daily or other fixed basis, allows him to invade the province of the jury and to get before it what does not appear in the evidence. Since an expert witness would not be permitted to testify as to the market value of pain and suffering, which differs in individuals and the degree thereof may vary from day to day, certainly there is all the more reason for counsel not to do so. The estimates of counsel may tend to instill in the minds of the jurors impressions not founded on the evidence. Verdicts should be based on deductions drawn by the jury from the evidence presented and not the mere adoption of calculation submitted by counsel.
>
> "We are of the opinion that the use by plaintiff's counsel of a mathematical formula setting forth on a blackboard the claim of pain, suffering, mental anguish, and the percentage of disability suggested by him on a per diem or other fixed basis, was speculation of counsel unsupported by evidence, amounting to his giving testimony in his summation argument, and that it was improper and constituted error."

But, see, *Ratner v. Arrington,* 111 So. 2d 82 (Fla., 1959) in which the Florida District Court of Appeal approved the use by counsel for plaintiff of a chart showing various items of damage and suggesting amounts to be awarded therefor and, specifically, suggesting a per diem amount to be awarded for pain, suffering, physical disability and inability to lead a normal life. See also the Report of the Practice and Procedure Committee, page 497, this issue.

EVIDENCE—
TACTOGRAPH INADMISSIBLE

Bell v. Kroger Company, 323 S.W. 2d 424 (Ark., 1959)

In a death action arising from a collision between an automobile driven by the decedent and a truck owned by the defendant, judgment was rendered for the defendant in the lower court and the plaintiff appealed. The Supreme Court of Arkansas held, inter alia, that the admission of a "Tactograph" (an instrument containing a clock with a paper dial attached which is fastened onto the motor of the

truck in such a manner that a needle will indicate on the paper dial the speed of the truck at any given time and also each truck stop and time thereof) was error where there was insufficient proof of the accuracy of such Tactograph. Further, the court held that the testimony was not relevant or competent inasmuch as there was nothing in the record to show that speed was relied on as an element of negligence. Justice Holt, speaking for himself and Justice McFaddin, dissented, being of the opinion that the Tactograph information correctly was submitted to the jury for whatever value it might be to the jury in determining the question of negligence.

EVIDENCE–
TESTIMONY OF ACCIDENT ANALYST INADMISSIBLE

Venable v. Stockner, 108 S.E. 2d 380 (Va., 1959)

In an action arising out of a collision between an automobile and a tractor-trailer, the plaintiff offered as a witness a "safety engineer, accident analyst". He first went to the scene of the accident the day before the trial commenced and a year and a half after the accident and he examined marks on the pavement, the photographs that had been taken of these, the photographs of the damaged vehicles, and from these sources undertook to reconstruct the accident and express an opinion as to how it had occurred. The trial court admitted certain testimony of this witness and on appeal the Supreme Court of Appeals of Virginia held that such testimony was inadmissible. The court stated:

> "It is well settled that expert evidence concerning matters of common knowledge or those as to which the jury are as competent to form an accurate opinion as the witness is inadmissible. Or, to state the principle another way, where the facts and circumstances shown in evidence are such that men of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, the opinion of an expert founded upon these facts is inadmissible."

EVIDENCE–
UNSWORN STATEMENT OF PLAINTIFF ADMISSIBLE AS SUBSTANTIVE EVIDENCE; WISCONSIN MOTORISTS' MANUAL COMPETENT EVIDENCE TO ESTABLISH STOPPING DISTANCES

Steffes v. Farmers Mutual Auto, Ins. Co., 7 Wis. 2d 321, 96 N.W. 2d 501 (1959)

Actions were brought against the insurer of the driver of an automobile for the death of one guest in the automobile and for injuries sustained by the other guest. From judgments for the defendant, the plaintiffs appealed. The Supreme Court of Wisconsin held that the evidence sustained the jury's findings of assumption of risk by the guests who were with the driver in several taverns where the driver drank intoxicants prior to the accident. During the course of its opinion the supreme court also held that portions of the Wisconsin Manual for Motorists published by the Motor Vehicle Department of that state were admissible with reference to establishing the distances required to stop an automobile at certain specified speeds. The court further held that the unsworn statement of one of the plaintiffs made to defendant's insurance representative was substantive evidence in itself and was admissible as a part of the defendant's case in the personal injury action it being an admission against interest and, therefore, was not limited solely to the purpose of impeachment. (Contributed by Richard S. Gibbs, Milwaukee, Wisconsin, Northwestern Regional Editor)

EXCESS LIABILITY–
JUDGEMENT CREDITOR NOT SUBROGATED TO RIGHTS OF INSURED IN ACTION AGAINST INSURER

Chittick v. State Farm Mutual Automobile Ins. Co., 170 F.Supp. 276 (D.C., Del., 1958)

Defendant insurer issued an automobile policy to Charles Williams, the liability limit being $10,000.00. Williams was involved in a collision in which Chittick, a passenger in the other car, was killed. Subsequently, suit was filed against Williams by Chittick's widow and prior to

trial Mrs. Chittick submitted a settlement offer to insurer for an amount less than policy limits. The settlement offer was declined and judgement was recovered by Mrs. Chittick against Williams in the amount of $40,000.00. The excess of judgment over insurance was unsatisfied and this action was brought against the insurer by Mrs. Chittick to recover such excess, the complaint alleging that Williams "has a cause of action against the defendant (insurer) for the amount which the aforesaid judgment against him exceeds the defendant's limits of liability as set out in its policy of insurance and the plaintiff herein as the holder of said judgment is subrogated to the right of the said Charles Williams against the defendant insurance company." The United States District Court in Delaware sustained the defendant insurer's motion to dismiss for failure to state a claim, the court holding that the tort judgment creditor of the insured was not subrogated or otherwise vested with any rights the insured might have against the liability insurer for failure to settle the original tort claim against insured within policy limits. The court noted:

> "In 8 Appleman Insurance Law & Pr., Chap. 201, Sec. 4831 there does appear this statement:
>
> > 'An insured third party who has recovered a judgment against the insured generally has been held to be subrogated to the rights of the latter and he can maintain an action directly against the liability insurer.'
>
> "The generality of this statement may be somewhat misleading. If it is confined to a liability within the monetary limits of the policy then, perhaps, the statement may be fully accepted. A careful inspection of the sustaining cases does not disclose any which involve a claim for an amount exceeding the limits of the policy and based upon a tort committed by the insurer and involving a personal duty owed to the insured by the insurer.
>
> "Upon the contrary, several cases have specifically passed upon the question here involved and reached conclusions in harmony with the views of this court."

(Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

FEDERAL JURISDICTION—JURISDICTIONAL AMOUNT AFFECTED BY POLICY LIMITS

Payne v. State Farm Mutual Auto Insurance Co., 266 F.2d 63 (5 Cir., 1959)

Under the Louisiana direct action statute the father brought suit against the insurer for personal injuries sustained by the son when the son was struck by insured automobile, the suit having been for $50,000.00 for personal injuries and $865.68 for medical expenses. The insurer moved to dismiss the complaint on the ground that its liability was limited to $10,000.00 for personal injury. The insured was not made a party defendant. The plaintiff later filed an amended complaint to include property damage to his son's clothing in the amount of $15.00 hoping to overcome the jurisdictional barrier. The district court dismissed the suit for lack of jurisdictional amount and on appeal the ruling was affirmed. The United States Court of Appeals for the Fifth Circuit held that in a suit for damages for personal injuries brought against an insurer alone the jurisdictional amount is controlled by the limitation of liability in the policy on which the plaintiff sued. The $15.00 claim for property damage was properly a claim by the father, individually, and cannot be added to the $10,000.00 sought on behalf of the child. In substance, there were two claims, one which could not exceed $10,000.00 under the policy and the father's claim for $15.00. Neither claim met the jurisdictional test.

FIRE INSURANCE AND EXTENDED COVERAGE—FROZEN PIPE DAMAGE RESULTING FROM WINDSTORM NOT COVERED

Abady v. Hanover Fire Insurance Company, 266 F.2d 362 (4 Cir., 1959)

Insureds brought suit on basic fire insurance policies with extended coverage. Insureds contended that a windstorm had dislodged a hatch leading from the attic space to the roof and that the winds blowing through the attic with freezing temperatures had frozen the water pipes in the attic causing them to burst and creat-

ing extensive water damage in the building. The district court granted the motion of the defendant for a directed verdict and on appeal this was affirmed. The United States Court of Appeals for the Fourth Circuit held that the terms "wind damage" or "loss as a direct result of wind" embodied in a provision insuring against damage by windstorm if taken and understood in its plain, ordinary and popular sense, connotes damage due to the strength or *force* of the wind. Therefore, no coverage was afforded by the policies.

LIABILITY–
CHARITABLE IMMUNITY DOCTRINE REAFFIRMED IN VIRGINIA

Memorial Hospital, Inc. v. Oakes, 108 S.E. 2d 388 (Va., 1959)

Plaintiff's decedent was being administered oxygen when he and the oxygen tent caught fire and the decedent died of the burns the following day. Suit for death by wrongful act was brought against the hospital and a jury verdict of $12,500.00 was returned. The Supreme Court of Appeals of Virginia, after reviewing the conflicting authorities on the point, held that the charitable immunity doctrine was established in the earlier Virginia case of *Weston's Admx. v. Hospital of St. Vincent, etc.,* 131 Va. 587, 107 S.E. 785 (1921), is firmly embedded in the law of the State and has become a part of its general public policy. The court stated that if it be considered desirable to abolish such immunity it would be more appropriate for the General Assembly of the state to act than it would be for the court.

LIFE INSURANCE–
INSURED'S DIRECTIONS AS TO DISPOSITION OF POLICY PROCEEDS PREVAIL

Vant v. Mutual Benefit Life Insurance Company, 262 F.2d 803 (3 Cir., 1959)

Under the terms of a policy of life insurance the insured contracted with the insurer that the payment of interest on the principal sum of the policy should be made to the widow during her lifetime and the entire proceeds to the son on her death. The widow and the son brought suit to obtain immediate payment of the entire proceeds of the policy. The United States Court of Appeals for the Third Circuit affirmed the lower court judgment adverse to the widow and the son. The court held that the widow and the son have not alleged or shown justification, whether on a theory or trust or otherwise, for equitable intervention overriding the arrangement made by the insured with the insurance company for the deferment of payment of the proceeds of the insurance policy.

LIFE INSURANCE–
PUTATIVE WIFE ENTITLED TO POLICY PROCEEDS

Aetna Life Insurance Company v. Messier, 173 F.Supp. 90 (M.D., Pa., 1959)

Insurer brought interpleader action to determine which of three claimants was entitled to the proceeds of life insurance. The insured had not obtained a divorce from his first wife before purporting to marry another woman with whom he thereafter lived until the time of his death. The insured named the second woman as the beneficiary under his policy of life insurance and further designated her as his "wife" in the policy. The United States District Court in Pennsylvania held that there was nothing in law to prevent the putative wife from being named as beneficiary and receiving benefits under the group life contract. The court further held that even if she was not entitled to use the insured's surname or to be called his "wife", she was entitled to the proceeds of insured's group insurance when it was clear that she was the party designated as beneficiary by use of the insured's surname and description "wife".

MULTIPLE COVERAGES–
"OTHER INSURANCE" CLAUSES REJECTED AND LOSS PRO-RATED BETWEEN INSURERS

Lamb-Weston, Inc. v. Oregon Automobile Insurance Co., 341 P.2d 110 (Ore., 1959)

Lamb-Weston, Inc., leased a truck from Shafer and operated it negligently, causing

damage to a warehouse. Warehouse owner sued Lamb-Weston, Inc., for damages. Shafer carried insurance on the truck with Oregon Automobile Insurance Company (Oregon) whose policy had the standard omnibus clause and "other insurance" clause providing for pro-rating with other "valid and collectible insurance". Lamb-Weston, Inc. carried non-ownership vehicle coverage with St. Paul Mercury Indemnity Company (St. Paul) whose "other insurance" clause provided that its coverage "shall act as excess insurance over and above such other insurance". Lamb-Weston, Inc. tendered defense of warehouse damage action to Oregon who declined. Lamb-Weston, Inc. settled action through loan receipt transaction with St. Paul and then sued Oregon to recover amount paid in settlement. The Supreme Court of Oregon held that Oregon was liable only for its pro-rata share of the loss, the court stating:

> "The 'other insurance' clauses of all policies are but methods used by insurers to limit their liability, whether using language that relieves them from all liability (usually referred to as an 'escape clause') or that used by St. Paul (usually referred to as an 'excess clause') or that used by Oregon (usually referred to as a 'pro-rata clause'). In our opinion, whether one policy uses one clause or another, when any come in conflict with the 'other insurance' clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto."

(Contributed by Robert T. Mautz, Portland, Oregon, State Editor for Oregon)

OMNIBUS CLAUSE– DEVIATION FROM PERMISSIVE USER

Williams v. Travelers Insurance Company, 265 F.2d 531 (4 Cir., 1959)

Automobile passenger brought suit to recover for personal injuries suffered in a collision involving an automobile being driven by a garage mechanic. The mechanic had been instructed by his employer to take the automobile out that night and the next morning for testing purposes. The mechanic took the car to his home and then after dinner he drove the car with his wife and three children and a friend to his father's home approximately 26 miles distant. On his return trip the collision occurred. The Fourth Circuit Court of Appeals affirmed a lower court judgment for the insurer holding that the actions of the employee constituted a deviation from the permissive user and did not fall within the scope of the omnibus clause.

PERSONAL PROPERTY INSURANCE– FAILURE TO DISCLOSE TRUE VALUE OF UNSCHEDULED PROPERTY HELD TO BE MATERIAL CONCEALMENT

Merchants Fire Assurance Corporation v. Lattimore, 263 F. 2d 232 (9 Cir., 1959)

The insured recovered judgement against insurer under a policy of personal property insurance, part of the award being for loss in connection with the disappearance of or damage to certain scheduled fine art and the balance being for certain unscheduled personal property covered by a personal property floater provision. One of the conditions of the policy was that the policy should be void if the insured concealed or misrepresented any material facts or circumstance concerning the insurance. The insured declared the unscheduled property value to be $9,550.00 whereas the actual value of the unscheduled property was at least $36,500.00. The insurer contended that the discrepancy in values constituted a material concealment so as to invalidate the policy inasmuch as the insurer would not have issued a policy for less than 80% of the total value of the property owned. The Ninth Circuit Court of Appeals held that as a matter of fact and law the insurer had established the defense of concealment entitling him to void the personal property floater provision of the policy and, therefore, reversed the action of the district court in this regard.

PRODUCTS LIABILITY– STRUCTURAL FAILURE INVOLVED JURY QUESTION

Pryor v. Lee C. Moore Corporation, 262 F. 2d 673 (10 Cir., 1959)

Pryor sustained injuries when a derrick collapsed while under strain of pipe loose-

ning and pulling operations. Pryor was paid compensation, following which Pryor and the compensation carrier sued the manufacturer of the derrick. The evidence showed that the derrick collapsed by reason of the failure of a weld in one leg of the derrick. The derrick was 15 years old, had been in almost continuous use for such 15 years, and had always given safe and satisfactory service. The trial court entered directed verdict and judgment in favor of the defendant manufacturer on the grounds that 15 years of safe use foreclosed any probability that it was defectively or negligently made. On appeal, the United States Court of Appeals for the Tenth Circuit reversed and remanded for a new trial. The court held that it was a question for the jury to determine as to whether or not a defective weld at the foot of one leg of the derrick caused the derrick to collapse under ordinary pressure being applied in the routine operation after 15 years of safe use.

But see, *Lynch v. International Harvester Company*, 60 F.2d 223 (10 Cir., 1932) in which it was held that five years of constant use of a threshing machine was a conclusive denial and contradiction of allegations that the machine was imminently dangerous when defendant sold it. In both *Pryor* and *Lynch*, Oklahoma law supposedly governed but with differing results. (Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

PRODUCTS LIABILITY— VENDOR NOT LIABLE FOR INJURY RESULTING FROM LATENT DEFECT IN LADDER

Burgess v. Montgomery Ward & Company, 264 F.2d 495 (10 Cir., 1959)

Verbanic purchased a 16 foot extension ladder from Montgomery Ward & Company (but manufactured by another company) and loaned it to his neighbor, Burgess, who used it in the installation of some awnings on his house. While Burgess was standing on the second rung from the top of the extended ladder, the upper right rail broke and he fell to the ground sustaining serious injuries. An expert testified that because of spiral graining of the wood the railing at the point of failure had only 60% of normal strength but this defect was discernable only to the trained eye. The complaint was based on the theory of warranty. The lower court granted defendant's motion for directed verdict and on appeal this was affirmed. The United States Court of Appeals for the Tenth Circuit, applying Kansas law; observed that a ladder is a harmless, simple device of common use and is not inherently dangerous as is an unwholesome food, a poison, an explosive or certain types of mechanical contrivances. The court referred to section 402 of the Restatement of Torts to the effect that a vendor of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not subject to liability for harm caused by the dangerous character or condition of the chattel even though he could have discovered it by an inspection or test of the chattel before selling it. The court held that Montgomery Ward was operating a retail store and not a testing laboratory and although there were no Kansas decisions precisely in point the court was of the opinion that the Kansas Supreme Court would not wish to impose the responsibility on the operator of every retail store of testing ladders for structural strength before sale.

WORKMEN'S COMPENSATION— PARTNER HELD TO BE EMPLOYEE AND COVERED BY ACT

Superior Insurance Company v. Kling, 321 S.W. 2d 151 (Tex., 1959)

Kling filed a claim for compensation with the Industrial Accident Board for injury resulting, among other things, in the loss of his arm. The board awarded him compensation and the insurer appealed from the award taking the position that Kling was precluded from recovery by virtue of the fact that he was a partner in the insured firm and hence not entitled to receive compensation under the Texas act. The Texas Court of Civil Appeals held that the insurer had knowledge of the facts of ownership and assured Kling that he had coverage. The court further held that under the factual situation presented, the interest of Kling in the partnership was so small (1/18) that such interest should constitute an exception to the Texas view that a partner cannot likewise be an employee. (Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

From the EDITOR'S NOTEBOOK

In this column, from time to time, the Editor will publish news and views that he believes may be of more than passing interest to the readers of the Journal. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed. Contributions to this column will be welcomed.

IN the heart of the magnificent Canadian Rockies, nestled in Bow Valley amid rich evergreens, the old world hospitality of Banff Springs Hotel welcomed 902 IAIC members, their families and guests to our Thirty-Second Annual Convention. As usual, the program was splendid. The proceedings and addresses appear in this issue of the Journal.

For entertainment, those in attendance had everything. From the ski-lift to the fabulous golf course, from the grandeur of the snow fields to the colorful South Pacific songs and dances of Hilo Hattie and her Hawaiian troupe, it was all there.

And best of all was the gracious hospitality of our hosts at Banff and our Canadian members who outdid themselves in making sure that this meeting would be one to remember.

Members and guests attending our 1959 convention at Banff and members' home addresses are listed in a separate pamphlet that comes to IAIC members with this issue of the Journal. It is intended to be placed in the separate Roster pamphlet mailed to members last April. We should like your comments on this procedure.

"What to Do About Experts" is the thought-provoking title of an interesting short article that was first published in the New Jersey Law Journal and then in the Appraisal Journal. Believing that it is worthy of consideration by our readers, we reprint it, with permission, herewith:

The testimony of experts who disagree widely about everything in the case except the name of the plaintiff or the location of property makes a travesty of justice. Moreover, the spectacle which experts make of themselves tries the patience of courts to the breaking point. The result in the area of property valuations are well illustrated in a recent condemnation case before the Pennsylvania Supreme Court. The experts' opinions ranged from a valuation of $8,000 for the state to $72,700 for the owner. In desperation, the trial judge told the jury:

> "If I were to give you my interpretation of an expert witness, you wouldn't like it and the lawyer wouldn't like it . . ."

In the end, the jury was charged to use "horse sense". With evident regret, the Pennsylvania Supreme Court disapproved this expedient as a way out of the dilemma. Justice Musmanno observed:

> "It is suggested, in the absence of any showing that an equine evaluation of real estate values is of particular merit, that such phrase be omitted from future charges, especially in view of the fact that the birth rate of horses in recent years has been declining so steadily that there is danger that within the foreseeable future jurors will have no knowledge of horses."

The best that the court could do was to reaffirm its dependence upon expert testimony, despite its faults. Accordingly, Justice Musmanno went on to say:

> "The difference between $8,000 and $72,000 is too enormous to be regarded lightly. And yet, there is something to be said for expert testimony because, without such evidence, the jury would be called upon to give a sheer guess. While it may be said that there is not much choice between an informed wrong opinion and an uninformed guess, an expert opinion is still entitled to respect. Assuming that the expert

witness is qualified in his field, his opinion at least is founded on an awareness of the factors entering into the estimate. An uninformed guess, to the contrary, is simply a shot in the dark—nothing more. There is more chance for a trained rifleman to hit the target of truth than one who simply closes his eyes and pulls the trigger." *Brown & Vaughn Development Co. v. Commonwealth,* 393 Pa. 589 (1958).

Familiar as this result may be, it amounts to a counsel of dispair. The widely discordant views of medical and other experts do not merely subvert justice in the particular case. In the long run, they also deprive the law of the benefits of the latest scientific advancements. For so long as experts disagree about them in court, whatever the best informed members of the same profession may do in hospitals or in the field, judges are compelled to forbid reliance upon these discoveries. Thus, justice is defeated and the public is cheated, not because experts are not able to speak impartially, but rather because the courts have not yet devised a method which will tempt them to do so.

The device employed by some judges, namely the superimposition of a court designated expert, who is identified as such to the jury, merely temporizes with the problem without solving it. It does not avoid the degrading spectacle of the babel of expert confusion, and it prompts automatic and undescriminating acceptance of the court's expert, whatever his limitations may be.

We need to do better. If we could make the primary loyalty of experts as witnesses run to the court rather than the parties, we would take a long stride in the right direction. This might come about in time, if not at once, if the selection of experts by the parties was confined to the names on a court appointed panel. The initial compilation of such a list need not be too exacting. However, after every trial which featured gross and irreconcilable differences between experts, the presiding judge would refer the case to a committee on qualifications, drawn from the bar as well as the other profession concerned. The issue would be whether some, or all, of the experts involved should be dropped from the panel. There must be very few practitioners of any of the expert disciplines who would not be deterred from sharply slanted testimony by the possibility of disqualification. It ought to be possible to catch up with those exceptions in fairly short order.

This system has marked advantages over court appointed experts. In areas where the profession itself is divided, it would preserve freedom as indeed it should, for each party to seek out a legitimate exponent of the view which favored his cause.

In the many law reviews published by law schools across the country is a wealth of material of substantial value to the practicing lawyer. Unfortunately, time will not permit most of us to do as much reading in this field as we would wish. The Journal hopes to render a service to its readers, in this connection, by presenting brief surveys of outstanding law review articles in the fields of insurance law, negligence law, and practice and procedure. It is our plan to begin this feature in the January, 1960, issue of the Journal.

Meanwhile, we call your attention to the September, 1959, issue of the Western Reserve Law Review, which contains the following good articles, among others:

"Privileged Communications Between Physician and Patient", by Clinton DeWitt.

"Architects' and Engineers' Third Party Negligence Liability—The Fall of the House of Privity", by George M. White.

Pictures of authors of articles and brief biographical sketches will be used in the Journal, beginning next year. Therefore, it is suggested that when you commence to write your next article you also have your picture taken.

OUR READERS SPEAK

Readers of the Journal are invited to use this department as a place to express their thoughts on subjects of insurance law, trial practice, and the like. The opinions expressed are, of course, those of the writers and are not necessarily the views of the Journal or the Association.

Editor of the Journal
Dear Sir:

During the recent sessions of the Insurance, Negligence and Compensation Law Section, ABA, at Miami Beach, Florida, a panel discussion was held:

"The Pennsylvania Rules: (1) Ad Damnum Shall not be Revealed to Juries; and (2) Estimates of Dollar Amounts of Damages for Pain and Suffering by Hours, Day, Month, Year or In Toto Shall not be Furnished Juries"

At the Miami Beach panel discussion, it was brought out that *Botta v. Brunner*, 26 N.J. 82, 138A. 2d 713 (1958), adopted for New Jersey the Pennsylvania rule forbidding disclosure to juries of the amounts sued for in personal injury cases. It is believed that there is good reason to anticipate a trend toward adoption of that rule in other jurisdictions.

It was also brought out that there is already a marked trend of decisions in this country against permitting plaintiffs' lawyers in personal injury cases to set down on a blackboard, along with stipulated or proven special damages, the attorneys' estimates of the dollar value of plaintiffs' pain, suffering and mental anguish.

This particular tactic was being widely used outside Pennsylvania prior to *Botta v. Brunner*. Not only were pain, suffering and mental anguish so listed, but one-half dozen or so synonyms for what was exactly the same things were also being used, resulting, in some cases, in overlapping itemization of what were essentially the same things. This decision initiated the new trend.

A study of the cases prior to *Botta v. Brunner* will reveal that in many of them defense lawyers failed to make proper objections to the blackboard tactics in question. Herewith a form of pre-trial motions which will effectively raise both issues. These motions, if used, should be brought up and be disposed of at the pre-trial conference. If no pre-trial conference is held, they should be brought up before the *voir dire* examination of jurors, particularly in jurisdictions where the judges ordinarily, in such examinations, call attention to the amount sued for. It is, of course, also important to renew these objections at the proper point in the proceedings and if overruled, bring out the time during which the blackboard figures are exposed to the jury's view.

Judge Alexander Holtzoff, of the United States Ditrict Court for the District of Columbia, who presided as moderator at the recent panel discussion, revealed that he enforces both Pennsylvania rules in his court.

IAIC members who do not belong to the ABA, Insurance, Negligence and Compensation Law Section, would be well advised to enroll. The full text of the panel discussion referred to will appear in this year's section proceedings and will prove, I believe, alone worth the price to IAIC members of a section membership.

Very truly yours,
Stanley C. Morris
Charleston, West Virginia

September 4, 1959

Pre-Trial Motions of Defendants

Come now the defendants and move the court:

I. That the amount sued for in this case be kept from the jury throughout the trial and that, to this end:

1. The court make no mention of this amount in examining the jurors upon their *voir dire*;

2. Counsel for plaintiff be instructed to make no oral mention of this amount in any phase of the trial;

3. No mention of this amount be made in any written instruction read to the jury; and

4. That the summons and declaration in which this amount is stated be not given to the jury to take to their jury room.

II. That plaintiff's counsel be instructed that no figures may be placed upon a blackboard, upon large sheets of paper, or be otherwise presented to the jury whereby the amount sued for or counsel's estimate of a proper amount per hour, per day, per week, per month, per year, or in gross, to be found by the jury for plaintiff's pain, suffering and mental anguish, be stated.

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PROCEEDINGS

32nd Annual Convention International Association of Insurance Counsel

BANFF SPRINGS HOTEL
BANFF, ALBERTA, CANADA

GENERAL SESSION

JUNE 30, 1959

THE GENERAL Session of the Thirty-Second Annual Convention of the International Association of Insurance Counsel convened at the Banff Springs Hotel, Banff, Alberta, Canada at 9:20 o'clock a.m., President G. Arthur Blanchet presiding.

PRESIDENT BLANCHET: Members of the International Association of Insurance Counsel, their ladies and guests, with a happy and a hearty greeting of welcome and with an appropriate feeling of responsibility, I convene the Thirty-Second Annual Convention of this Association.

We are rapidly approaching a milestone, a third of a century, during which this Association, through its conventions, has contributed, and contributed well, to a great industry, the insurance industry. At the threshold of this meeting, it is entirely fitting and proper that we should ask Almighty God to continue to shower His blessings upon our members and their friends.

Accordingly, if you will kindly rise at this time, I shall ask the Reverend George Hollywood, of the Church of St. George's in the Pines, Banff, Alberta, to give the invocation. Reverend Hollywood.

THE REVEREND GEORGE A. S. HOLLYWOOD: Almighty God, our Heavenly Father, in whom we live and move and have our being, we beseech Thee for the conference about to be held, grant us Thy guidance and inspiration to all who are in positions of leadership and responsibility and an earnest and sincere desire to serve Thee and our fellow men within their vocations and all who partake therein.

We give Thee humble thanks for Thy many blessings and this time for the opportunity of fellowship and discussion within these Rocky Mountains which tower over Thy majesty, Thy greatness and Thy power.

May we know in our own life Thy majesty, Thy greatness and Thy power through Jesus Christ, our Lord. Amen.

MR. FORREST A. BETTS: Mr. President, may I approach the dais?

Arthur, it seems to me as I have observed you opening this meeting in your usual courteous and beautiful manner, that you still are not entirely equipped to do the job to which we elected you last year. You do not have all of the working tools of this order, so to speak. There is a reason for it, of course.

With the permission of the Association, I filched my working tool last year after I gave it to you at the end of the session, and so, it is with a great deal of pleasure, on behalf of the Association, I present to you the emblem of authority which I know that you will use in the utmost good manner for the Association, and that it will be a memento which will daily call to your mind the work that has been necessarily incident to your job and the pleasures which shall be yours in retrospect and in contemplation of your year.

I give you herewith the gavel of authority. (Applause)

PRESIDENT BLANCHET: It was a year ago, Red, that I temporarily received a gavel and at that time I told you this: that for a long time I would cherish that symbol. How much more will this perma-

nent tie serve as a reminder of the great privilege I have enjoyed in serving you.

This symbol will not only occupy a prominent place physically in my office but, more importantly, it will be a constant reminder of the fond and affectionate memories of the friendships which we have developed here. I thank you most sincerely.

(A motion was duly made, seconded and carried to dispense with the roll call and the reading of the minutes.)

It is axiomatic that credit shall be given where credit is due. The privilege which you are about to enjoy was brought about principally by Duncan Lloyd, who was very instrumental in effecting the arrangement whereby we will hear this morning a most appropriate and distinguished jurist.

The prominent jurist who has so kindly accepted our invitation to give the address of welcome was born in the province of Ontario, is a graduate of the University of Alberta, was called to the bar of Alberta in 1922, read law, as they express it here, with the firm of Savarny, Fenerty & Chadwick, was appointed to the Supreme Court in 1942, and has been Chief Justice of the Trial Division of the Supreme Court of Alberta since June, 1952.

It is indeed a great honor to be able to present to you the Honorable Campbell McLaurin, Chief Justice of the Supreme Court of Alberta.

Address of Welcome

HONORABLE CAMPBELL MCLAURIN
Calgary, Alberta, Canada

Mr. President and ladies and gentlemen:

I should like to say "fellow members of this Association," because before my elevation to the bench, I was a member of the Association, regularly read the Journal, and had always hoped that I would have the opportunity of attending a meeting at The Greenbrier, but did not do so until the chance was too late. So this is my first occasion to be with you.

It is a personal pleasure to me, with so many friends, particularly of the American Bar Association, to welcome you to my country and to my province and to these mountains, which we Britons greatly love.

Some of you, who may have come early, realize that there have been dreary days here, but the sun today is shining gloriously, and it is our sincere hope that you greatly enjoy your sojourn with us.

As we all know, this foregathering of lawyers is sometimes much more valuable in its fraternal and social aspects than the formal sessions. The setting presented in these mountains gives you an opportunity to get better acquainted with your fellow practitioners spread throughout the broad expanse of this continent under which we are privileged to live.

I gather that Mr. McArty, the genial manager of this hotel, has been giving you an opportunity to be wining and dining graciously. He will not be in the position, I hope, of the man that I heard of who was shipwrecked in the Caribbean on one of the cruises. Of the passenger list of three hundred, he was the only one to survive, and with his swimming talents reached a little dotted sandy palm. He looked at the palms. It didn't even happen to be coconut palms, and there he was. He said, "I saved my life, and now I am going to starve to death." He put his hands in his pockets and he found a Continental Casualty policy with enough provisions to keep him going for a year. (Laughter.)

I thought it might be appropriate if I made just a few remarks about my own province; just to tell you in a sort of a kindergarten fashion a few of the facts with which you might not be acquainted and which you might leave the province without learning.

Alberta is about 750 miles long. It is 400 miles wide in its widest point. Its population is 1,250,000 people. Our two largest cities: Edmonton, the capital, also the University is situated there, a place of 250,000

to 275,000, people. It has more than practically trebled its population in the last ten years. Calgary is a city of something over 200,000.

The economy of the country is primarily agricultural, a rich grain country and a rich cattle country. There are limitless deposits of coal in Alberta, which, in an age of alternative energies, is not being greatly exploited at the present time, but which in some different age might come into its own.

There is also considerable timber in some portions of the province, but not in the terms of British Columbia or the states of Washington or Oregon.

Then, I am sure that some of you, particularly in the southwest, would like a word about our oil. There were discoveries here made many years ago, but the oil development blossomed up just about ten years ago, and has resulted in the growth of the population.

The production, the present production, of oil going to markets is about 450,000 to 500,000 barrels a month. There is a natural productive capacity of close to a million barrels, if the market was available. It goes by pipelines to Vancouver and goes into the Washington and California markets to some extent.

There is another pipeline that wends its way eastward, passes through your own country in the states of Minnesota and Wisconsin, and onward to Toronto and, when markets are available, these pipelines will carry, as I said, upward of a million barrels of oil to parts of the United States and Canada. The potential far exceeds that, and Alberta and the adjoining provinces, Saskatchewan and the northwest territories, that stretch to the arctic tundras, provide a potential oil area which will never put us in the position we were in during World War II, of fearing that this continent at home would be without adequate oil resources.

That is all I am going to say about our economy.

As you are a group of lawyers and as I am a member of the profession in Alberta, I thought perhaps you might like just a word or two about our courts.

All of the judges in Canada are federally appointed for life, whether they are in the inferior courts or the superior courts. Generally, throughout Canada, you might be interested in knowing that the jury system is falling bit by bit into disuse. I think that there is more spiritual attachment to the jury system in the United States of America than anywhere in the world, not excepting England, where the system was invented. In Alberta, we have no backlog whatsoever in cases. They are all up to date.

I might mention, they are up to date, not withstanding the fact that I was privileged to have five months leave of absence and Mrs. McLaurin and myself took a tour around the world. That is, in part, due probably to our absence of jury trials. We have not had a civil jury trial in Alberta for eight years. I am not going to bore you with all the reasons why that occurs.

Alberta happens to be a singular jurisdiction, not paralleled by any state of the Union or by any province of Canada. We are now doing ninety-five per cent, anyway, of our criminal work by judge alone. We are practically to the point where the only time where we have a jury in a criminal matter is in a murder trial, and then the assistance may often come from the bench, because with us, conviction of murder results in a mandatory sentence of hanging, and no judge wishes to take the sole responsibility for that awful verdict. In these circumstances, you can understand that we have not been troubled by some of the rather great verdicts in the United States. I think Melvin Belli calls them the animadvertence.

I heard of a case in Montreal where, as many of you know, the predominant population is French and Catholic. They had an atrocious verdict of two or three hundred thousand dollars for injuries probably worth fifty thousand dollars and the insurance company involved had to pay their money, but they felt they were dealing with a malingerer and they hoped they might be able to get him to disgorge some of his ill-gotten claims by threats.

So they told him for the rest of his life they were going to pursue him by detectives and they would finally be able to catch him for perjury and he would get condign punishment in the penitentiary where he could not enjoy the wealth he had improperly secured.

Well, this successful claimant immediately retorted, "I am quite ready to go out. Please let me meet your detectives. How many — three or four of them? I want to take them to Paris. I will pay all ex-

penses. We will have some night life there. I will install them in the best hotel and then," he said, "After three or four days, we are going to go down to Lourdes and you are going to see the darndest miracle that ever happened."

Now, I think I have said something about ourselves. I think that I have indicated that I, emotionally and through training, have some feeling of association with you as insurance counsel. I have said a little bit about our own province and our own mountains which are so beloved by us, and I hope you have a joyous and rewarding time here, and through the rest of your lives carry happy memories of having been in my province. (Applause.)

PRESIDENT BLANCHET: Thank you, Judge. The warm reception which you have given Judge McLaurin is a graphic demonstration of our appreciation of those kind words of welcome.

However, I should like to ask one of our own members, a most popular member, and a not too distant neighbor of Alberta, as he resides and practices in Seattle, to give, on behalf of each of us, a response to the welcome. I present to you the popular Stanley Long, of Seattle.

Response to Address of Welcome

STANLEY B. LONG
Seattle, Washington

PRESIDENT Blanchet, Chief Justice McLaurin, members of the Association, guests and friends. When President Blanchet gave me this most pleasant assignment, he gave it to me with two very positive admonitions: Number 1, he said, "Be brief." Number 2, he said, "No Scotch stories, please."

I am indeed grateful for the opportunity of responding to the cordial and gracious welcome which has just been extended us by Chief Justice McLaurin. I am sure that the reason that President Blanchet asked me to make this response was that I was born, raised, and lived in the great state of Washington, surrounded by Mt. Rainier and Mt. Adams and all of the great mountains of the northwest and, as a result, would not be completely overcome by the grandeur and breath-taking beauties of our surroundings here at Banff.

Now, it is seldom that counsel finds himself in the delightful position that I now find myself of having the last word with the court. I did not accept my responsibilities lightly, let me assure you. Indeed, I have prepared most thoroughly for this moment and, since I am not a member of the Canadian bar, nor required to make my living in the courts of Alberta, I find myself without fear of any judicial reprisals whatsoever.

I knew, of course, that Chief Justice McLaurin was a favorite speaker in the bar associations, both in the States and in Canada, and that he was tremendously popular among members of the bar and his colleagues on the bench in both countries. Nevertheless, I deem it fitting and proper, Mr. President, in view of the responsibility which you imposed upon me, to independently gather the necessary material to make a proper response here today.

Accordingly, I wrote hundreds of letters to bars throughout the provinces of Canada. I directed innumerable letters to attorneys in Calgary. I supplemented those letters by personal visits with many of the friends of the Chief Justice, including former Chief Justice Frye of the Vancouver court. I consulted with Frank Holman of Seattle. I interrogated him. I gathered the facts I wanted, to be able to give you just what needed to be acquired to make this response accurate and appropriate. Now, I asked all of these people, in all of my letters, "Tell me all the things about Chief Justice McLaurin. I want to know the facts."

I can now report to you the results of those detailed inquiries.

As expected, I learned that the Chief Justice was a skillful, resourceful and, I may say, highly successful practitioner and

trial lawyer with a record of never having lost a negligence case in his entire career. You notice this morning that he is even abandoning the jury system.

Upon becoming Chief Justice of the Supreme Court in Alberta, Justice McLaurin has been and is regarded as a learned, understanding and highly competent jurist and, most important, a jurist with a great sense of humor. I learned that the Chief Justice is essentially a perfectionist. He has never been reversed. His jury instructions are models of simplicity and accuracy, but the Chief Justice complains bitterly that he has not yet achieved what he regards to be the pinnacle of judicial distinction, namely, the ability to look a lawyer straight in the eye for two hours and heed not a blasted word he says. (Laughter.)

Now, in addition to the expected compliments paid to the Chief Justice by his friends, they all said to me, "Stan, you have asked us to tell you all the good things about the Chief Justice, asked us to tell even the best thing about the Chief Justice. Now, the answer to that is very obvious. Every man, woman and child throughout the provinces, Calgary and Alberta particularly, knows that the best thing about Chief Justice McLaurin is his lovely wife, Jessie.

Having in mind the best interests of the Association, I immediately dispatched a wire to our President which read as follows:

"G. Arthur Blanchet, President of the International Association of Insurance Counsel.

"My information clearly indicates you have unwittingly failed to select the most popular member of the McLaurin family to give the address of welcome at Banff (stop) Therefore, suggest you endeavor to persuade Chief Justice McLaurin to relinquish his appointment in favor of his charming wife, Jessie."

I recieved the following reply very promptly.

"Dear Stan:

"I am in complete accord with your suggestion. However, am advised Chief Justice McLaurin has worked hard and long at a carefully prepared address of welcome and failure to deliver same may result in serious frustration and consequent complications. (Signed) Arthur Blanchet, President."

Thus, my friends, we have been prevented from being formally welcomed to Banff by Mrs. McLaurin, and it is, therefore, my honor to present to you Chief Justice McLaurin's lovely and popular lady. I am going to ask Payne Karr of Seattle, a member of your Executive Committee, to present to her on behalf of our Association a small token of our esteemed admiration.

(Whereupon Mrs. McLaurin was presented with flowers.)

Now, Chief Justice McLaurin, we deeply appreciate the warm and gracious welcome you have given us here this morning and, although this is the Association's first visit to this awe inspiring, natural wonderland, I assure you we shall return soon and as often as you are willing to have us. Thank you, sir!

PRESIDENT BLANCHET: Thank you very much for the very appropriate response.

The cold, written phrases of the by-laws prohibit any formal resolution of commendation of any member of this Association, but there are no by-laws, nor any other prescriptions, which will prevent me at this time from expressing my personal admiration for the man who will introduce to you and the new members of this Association. I give you the ever popular past president, Lester P. Dodd.

MR. LESTER P. DODD: Mr. President and members and guests of the Association: As an important part of the presentation of these new members – and I will explain the reason for that in just a moment – this calls for my committee to be present. Will the following members of the committee, all of them that are here, please line yourselves up here: Vice Chairman Forrest A. Betts, F. B. Baylor, Alvin R. Christovich, P. H. Eager, Jr., John A. Kluwin, L. Duncan Lloyd, Paul J. McGough, Joseph A. Spray, Wayne E. Stichter, Lowell White, George Yancey and J. A. Gooch.

All of these gentlemen are past presidents of this Association. For some years I have wondered why a committee of this size was necessary to welcome the new members and I have just figured it out. Take a good look at them. Then, by contrast, you will find that our crop of new members looks indeed more promising. (Laughter.)

(Thereupon the new members were introduced and called to the front of the hall.)

Ladies and gentlemen, Mr. President, I present to you these new members, your

new members. You are indeed welcome. I know that you will enjoy your stay here and your future association with this organization.

I present to you, Mr. President, these new members.

PRESIDENT BLANCHET: Thank you for that fine introduction.

I wish to express on my own behalf and on behalf of each of us a sincere welcome to our new members. (Applause.) I see in very small print the next item on the agenda is the "Address of the President." This is a moment I have awaited for a long time. I know you, likewise, have been waiting for this moment a long time — not for the moment that I give a speech, but for the moment that I make the following announcement.

I will neither read nor orally deliver an address at this time. I will deliver a report to the editor of our Journal.* The precedent for the omission of the oral address was established by our good past president, Lester Dodd.

However, I experience a real temptation. What greater temptation could there be: a lawyer on his feet, a microphone in front of him and a captive audience. But I shall refrain and shall not bore you with the intricacies of our practice; of course, I only mention practice to give an opening for this little incident.

*The President's Report appears at page 491 of this issue of the Insurance Counsel Journal.

Last March, at a dinner, our firm celebrated its fiftieth anniversary. There were no speeches. There were just a few reminiscences. One rather amused me.

It seems that when one of the original partners first came with our firm, he was asked, "What did you do before you came here?" He said, "Oh, I was in private practice," and hastily added, "I had a great deal more privacy than practice."

I must and will conclude my remarks by an expression of gratitude to you. The opportunity to serve you has been one of the greatest events in my career. I shall cherish the association for a long time. I have been blessed with splendid cooperation. I would be remiss if I did not tell you now of the great assistance rendered to me by Blanche Dahinden, your Executive Secretary, and by Charles Pledger, your President-Elect. I shall purposely refrain from mentioning any other names, but I do want to say to each of you that I appreciate immensely the cooperation which you have extended, and I give you my sincere and heartfelt thanks. (Applause.)

Recently the Executive Committee arranged to consolidate the offices of Secretary and Treasurer. During this period of transition, the next speaker has indeed served us well.

It gives me great pleasure to introduce to you your Secretary-Treasurer, A. Frank O'Kelley of Tallahassee, Florida.

Report of the Secretary-Treasurer

A. Frank O'Kelley
Tallahassee, Florida

THANK you, President Art, and this has been, indeed, a most interesting year as Secretary-Treasurer.

When I would wear the hat of the Secretary or the hat of the Treasurer, our very efficient Executive Secretary would always hold over me a broad umbrella of protection from many details of the offices.

As of June 16, 1959, there were 1,718 members of the Association, and there was a net increase of 30 members since June 30, 1958. Our membership embraces this lovely country of Canada, including a new member from Newfoundland, the United States, including if I may, Hawaii, and Cuba.

During the year five of our members were distinguished by appointment to the Bench: Reginald I. Bauder, Los Angeles, California, to the Superior Court; Arthur J. Stanley, Jr., Kansas City, Kansas, United States District Court; W. E. Quick, Memphis, Tennessee, to the Circuit Court; Reid S. Moule, Buffalo, New York, to the Supreme Court of New York; F. M. Van Sicklen, Alameda, California, to the Municipal Court.

There were processed during the year

103 applications for membership of which 92 were approved, eight were rejected, two were withdrawn and one was held for further action.

At this time, there are being processed 39 applications for membership. In this connection, let me pay tribute to the members of the Executive Committee for the careful and conscientious manner in which applications have been considered.

Our fiscal year runs from November 1st through October 31st. For the year ending October 31, 1958, there were total receipts of $59,295.92. Expenditures were $55,330.97, an excess $3,964.95. The balance on hand on October 31st was $67,258.45. An audit was made when the duties of the Treasurer were transferred to me on November 1, 1958.

The following is a report for the period from November 1, 1958 through June 22, 1959:

Balance as at October 31, 1958:				
Cash:				
Checking Accounts:				
Marine National Exchange Bank, Milwaukee, Wis.			$ 6,202.28	
Marshall & Ilsley Bank, Milwaukee, Wis.			1,000.00	
Savings Accounts:				
National Savings & Trust, Washington, D. C.			2,887.11	
Second National Bank, Washington, D. C.			10,773.60	
Union Trust Co., Washington, D. C.			10,482.91	
Amer. Security & Trust, Washington, D. C.			10,456.76	
Riggs National Bank, Washington, D. C.			10,455.79	
Investments:				
United States Savings Bonds:				
Maturing Feb., 1966		$ 5,000.00		
Maturing Feb., 1967		10,000.00	15,000.00	$67,258.45
Receipts:				
Dues, 1959		$41,425.00		
Journal:				
Subscriptions	$ 2,402.50			
Binders	1,170.00	3,572.50		
Interest:				
Natl. Savings & Trust	43.28			
Second National Bank	161.59			
Union Trust Co.	157.24			
Amer. Sec. & Trust	154.56			
Riggs Natl. Bank	129.54			
U. S. Savings Bonds	207.00	853.21		
Convention Regis. Fees		6,270.95		
Miscellaneous		6.83	54,178.49	
Disbursements:				
Exec. Sec.'s Office Expense		9,549.31		
Journal:				
Publication Cost	18,272.89			
Binders	198.96	18,471.85		
Admission Fee Refunds		325.00		
Auditing Expense		225.00		
Mid-Winter Meeting Expense		7,915.82		
President's Office Expense		419.95		
Convention Expense		1,298.74		
Miscellaneous		91.61	38,297.28	
Excess of Receipts over Expenditures				15,881.21
Balance as at June 22, 1959				$83,139.66

Accounted For as Follows:

Cash:		
Checking Accounts:		
Marine National Exchange Bank, Milwaukee, Wis.		$14,166.23
Marshall & Ilsley Bank, Milwaukee, Wis.		2,000.00
First Wisconsin National Bank, Milwaukee, Wis.		6,270.95
Savings Accounts:		
National Savings & Trust, Washington, D.C.		2,930.39
Second National Bank, Washington, D. C.		10,935.19
Union Trust Co., Washington, D. C.		10,640.15
Amer. Security & Trust, Washington, D. C.		10,611.32
Riggs National Bank, Washington, D. C.		10,585.33
Investments:		
United States Savings Bonds:		
Maturing Feb., 1966	$ 5,000.00	
Maturing Feb., 1967	10,000.00	15,000.00
		$83,139.66

Let me say that during this period, most of the receipts for the year have come in, while there are yet many expenditures yet to be made. The budget which has been adopted for the current year anticipates expenses in excess of revenue. This is attributed to the general increase in costs of operation, to increase in costs of the Insurance Counsel Journal, and to the expense of this convention. Our Executive Committee considered, of course, that we are not an association for profit.

Thank you.

PRESIDENT BLANCHET: With great reluctance I have to announce now that we shall be deprived of a real treat this year. However, I do this only at the persistent insistence of our very able Executive Secretary.

Blanche has pointed out to me that the officers address these meetings only occasionally. She is very fearful that she will become a perennial.

I have bowed to her wishes, and therefore, I call on Blanche Dahinden to come to the dais to acknowledge the well-earned ovation which I am sure you wish to give her. (Applause.)

MISS BLANCHE DAHINDEN: Thank you, very much. There has been one interesting development in my life this year that I thought might be of interest to you. I wound up in the first edition of "Who's Who of American Women" — nineteen thousand women and me.

Naturally, I am pleased about it, and I want to thank you for it, because I am sure it was purely on the basis of the work that I do for you, and not on any of my past accomplishments. Thank you. (Applause.)

PRESIDENT BLANCHET: Thank you, Blanche.

It is fundamental that the life blood of this organization courses through the veins of the Journal. Its high standards are attributable to its editor and the state and regional editors.

As long as this Association survives, I I am sure that we will recall with fondness the meetings with our Editor Emeritus, George Yancey. I would like to ask George Yancey to stand so that each one of you may give him an appropriate greeting. (Applause.)

The editorial torch has been carried high by our able editor, Bill Knepper. The regional and state editors have been guided by Bill, who has performed a prodigious amount of real hard work in order to edit and do the thousand and one things required for the issuance of such a fine publication.

It is with pleasure that I present to you Bill Knepper, of Columbus, Ohio, our editor.

Report of the Editor

WILLIAM E. KNEPPER
Columbus, Ohio

Volume XXVI of the Insurance Counsel Journal, covering the year 1959, will be the largest in its history, containing more than 600 pages exclusive of the Roster. This has been made possible by your cooperation in supplying an adequate number of excellent articles for publication.

During this year the Executive Committee has authorized a pilot project to test the advisability of the distribution of the Insurance Counsel Journal – free of cost – to state court judges, both trial and appellate. We are in the process of making such distribution in four states, selected on a geographical basis, and the Executive Committee will give further consideration to this matter at the Mid-Winter Meeting. Your comments and suggestions will be appreciated. As you know, the federal judges have been receiving our Journal for several years, and many of them have written to comment favorably on its contents.

Also, the Executive Committee has authorized the preparation of a new General Index, covering all published material from the first Yearbook, in 1928, to the end of this year. In this General Index, we are attempting to provide complete information by subject matter and authors as to all of the wealth of material that has appeared in our publication during these 31 years. It will be ready for distribution early in 1960.

This year we have published our membership Roster as a separate booklet. This was done in the belief that the Roster will have greater utility in a separate binding and, also, the April issue of the Journal, which formerly contained the Roster, can better be preserved for future use.

A year ago, in my report, I said that opportunities were always available for those who like editorial work to become part of our editorial staff. Several offers were received and gratefully accepted. One, in particular, deserves special mention. R. Harvey Chappell, of Richmond, Virginia, has assumed full responsibility for editing our Current Decisions and he has done a splendid job.

Such opportunities are still available. In particular we need someone to work on the medico-legal department of the Journal. If you are interested, please tell us.

During the year to come the Journal will need your continued support and your articles. We urge each of you to write a paper for the Journal so that the rest of us may have some of the benefit of your research and experience.

And now, Mr. President, following the custom established by our Editor Emeritus, George W. Yancey, it is a pleasure to present to you a complete set of bound volumes of the Journal. All but the last volume have been shipped to your office. This one I now hand to you in token of our grateful appreciation of your faithful service to this Association.

PRESIDENT BLANCHET: Thank you, very much. Everybody praises the Journal, and to have it so attractively bound will add a great deal to my knowledge and the atmosphere of my office.

The introduction of the principal speaker at this morning's session is one which gives me a tremendous amount of personal delight, mingled with a large measure of sincere appreciation to him.

The speaker was born in New York, attended Loyola and was graduated from Georgetown University. More than twenty-five colleges and universities have conferred degrees upon him. Geographically, the degrees emanate from as far away as Christ College, Cambridge University, England, to Creighton in the West. They include such outstanding colleges and universities as Columbia, Holy Cross, Colgate, Lafayette, New York University, Rutgers, Marquette, Boston College, Detroit, Toledo, and Fordham, and so on and so on.

He was president of Fordham University, director of St. Ignatius Loyola Church in New York City and is now associated with the Jesuit Missions.

I invite Herb Dimond to act as escort, and it gives me extreme happiness to present to you the Reverend Robert I. Gannon, S. J.

Educating for an Age of Fraud

THE REVEREND ROBERT I. GANNON, S. J.*
New York, New York

PRESIDENT Arthur Blanchet's gracious invitation to come out and see Banff, Lake Louise, and 400 lawyers on the loose, called for a little research on the part of one whose insurance experience has been limited to fire insurance. So I got the back numbers of the Insurance Counsel Journal to see what the "International Association of Insurance Counsel" was up to and found that its members live their lives in close association with fraud, personal, national, and international. The most interesting case reported concerned a poetic genius named Thornberry, who made a living by dropping dead mice in bowls of chowder and offering to remain silent about the condition of the restaurants for $700 a bowl. The inference was that Mr. Thornberry's counsel was a member of some other international association and I couldn't help wondering if that association might not be more interesting and more prosperous than yours. The automobile damages fascinated me. It seems that a second-hand car, properly mishandled these days, can support a large family, and I hadn't realized how many people practice falling in the right places just as ball players do sliding into second. All in all, I am much edified that handing such fraud day after day you still keep your faith in human nature.

When I looked up the date of your foundation, (I assume that it coincides with the election of your first president,) it seemed logical enough that an association specializing in fraud should be established in 1920. That, as I remember it, was a time of slogans, and slogans always tend to put an experienced man on his guard. In 1920 there was an ex-college president in the White House. I have no prejudice against ex-college presidents. Some of them are as smart as an insurance counsel. But they do love to get a fat slogan by the tail, and Wilson was no exception. When he got us into the war (that he was elected for keeping us out of!), he told us that we were fighting not to save the British Empire—perish the thought!—but to keep the world safe for democracy by the noble principle of the self-determination of nations. Anybody would die for that! It was a great idea but it turned out to be a fraud. The Treaty of Versailles, which was signed the year before your incorporation, was not a treaty of peace. It was a fraud. It was a weapon of vengeance. Germany was reconstructed because it was left of Wilson at the time and Austria Hungary was dismembered because it was right of Wilson, although every college boy knew that Austria Hungary had been the balance wheel of Europe ever since the Congress of Vienna, and that smashing it into fragments was a short cut to chaos. The Slavs were enslaved by the Czechs and the Croats enslaved by the Slavs. France and Italy were handed over to the radicals, Japan to the Militarists, Ireland to Lloyd George's Black and Tans, and, by way of condign punishment, the U.S.A. was handed over to Warren Gamaliel Harding. Self-determination was such a success, made the world so safe for democracy that the world war—hot, cold or tepid—is still going on. This period of roughly half a century—we may refer to as our age.

It has been called many names beside "The Atomic Age", and some of them have been complimentary. For example, it is known as "The Age of Physical Science"—"The Age of Space", and certainly we have seen an explosion of scientific knowledge beyond the wildest dreams of a Jules Verne. Men in business call it the "Age of Organization, Mass Production, Advertising", and truly there has never been anything like it, but the aspect is rather limited. Optimists in the university call it the "Age of Health, Culture and Comfort", and the pessimists agree that if the consumption of cosmetics, liquor, tobacco, newsprint and gasoline is any indication of happiness or intelligence, the name might be appropriate. But in this "Age of Health, Culture and Comfort" we have seen nearly 10,000,000 out of the 18,000,000 men who were called up for the draft, rejected outright or prematurely separated as unfit for military service. That would seem to indicate that, as far as the United States is concerned,

*Former president, Fordham University

less than half of the present generation has enough health, culture and comfort to qualify as buck privates in the lowest ranks of the armed forces.

Now we come to the less complimentary names. The late Col. McCormick of the Chicago Tribune used to call it the "Age of the Roosevelts", because he never did fully appreciate Eliot's family. But he exaggerated their roles. They did not really mold the age, they just bloomed in it. Others still want to call it "The Age of Blood". But our primacy in the destruction of human life is accidental. We are more efficient, that's all. Other ages have been just as savage as ours. Then there are dark mornings when all of us want to call it the "Age of Inefficiency." It seems at such times that there are no plumbers who can plumb, no barbers who can barb, no salesmen who can sell, no judges who can judge, no preachers who can preach. But the liver has a good deal to do with that. Finally there are those who study what is left of our labor-management relations after 50 years of strip poker, study what is left of our schools after 50 years of John Dewey, study what is left of our United States Supreme Court after 50 years of Oliver Wendell Holmes, and realize with a shock that in all these fields the relative has taken the place of the absolute. Nothing is considered absolutely right any more and nothing eternally true. So they want to call our age, the "Age of Confusion". But all this is new only on the national level. On the international level conditions have been like this for 500 years. When the late John Foster Dulles settled the Suez crisis on the basis of eternal principles, our allies did not know what he was talking about. England, France and Israeli reacted just as Jimmie Hoffa would in similar circumstances. Why shouldn't they rub out an ambitious leader who couldn't be controlled?

Must we then reject all efforts to find a title for this graceless age of ours that will not be incomplete or misleading? Isn't there any characteristic that is more noticeable in our age than in the past and important enough to give it a special tone? Well - can you think of any other age that enjoyed such a predominance of fakers all over the world in public and private life? Why not just call it "The Age of Fraud", having in mind first the general sense of dishonesty and then the technical sense which you lawyers know so well! "A representation of fact consciously untrue made with the purpose of causing another to act and resulting in damage."

That puts modern life in the same general class with shell games and handkerchief games, except that its atmosphere is more dangerous to the United States. It involves a deeper fraud than company fraud or banking fraud or mail fraud.

Twenty years ago, the Great White Father was reigning in the White House. What a college president he would have made! What commencement speeches! What slogans! What budgets! Years before, when he was serving under Wilson on a dry ship in the Navy, he had seen the German Empire cleverly undermine the Russian Empire, not with guns but with a gigantic fraud called Communism—a philosophy of government that flourishes by selling stock in a non-existent goldmine. Twenty years later, Germany, fearing the fraud that had already engulfed Russia, developed an antibody, a counter-fraud called Nazism. When this fraud and counter-fraud had resolved themselves into a bloody vortex, we got in the fight to make certain that the victorious fraud would be the weaker one, thereby assuring the survival of the fraud that has dominated all our thinking ever since.

Having won the war, we proceeded to lose the peace through another fraud perpetrated under the spell of previous frauds. This one was staged in San Francisco and was a huge success. Two thousand, seven hundred and eighty-four people came together from fifty different countries. Their eloquence covered seventy-eight tons of paper in spite of the fact that Ireland was excluded. The press and radio sent 2,636 publicity experts to report every golden word of which there were sometimes 1,700,000 a day. Even in California, where they do things in a big way, they considered it a generous discussion and adequate coverage. But up on Nob Hill, a small group in a smoke-filled room drew up the Charter of the United Nations and carefully planted in its heart a cynical fraud, the Yalta Formula, the famous veto plan that disfranchised for ten years five of the most civilized countries on the face of the earth while reducing most of the rest to an expensive debating society. The President of the United States, good old Harry Truman, one of the most amiable figures in public life, started them off with his usual *joie de vie*. It was more fun for Harry than the Potsdam Conference, but responsible

Americans have done a lot of worrying ever since.

So today, surrounded by international fraud, we live in a world of fear wondering always whose bluff is going to be called by whom. And all this has an effect on our peace;—our personal peace, our industrial peace, our domestic peace, and even our religious peace. We have a series of undeclared wars around us on every level, so that it would be surprising if in the midst of all our shallowness and pretense, our educational ideals were sound.

Two or three years ago John W. Gardner, president of the Carnegie Corporation in New York, issued a report. In it he suggested that mass education was posing grave questions that had to be answered. He noted that, in 1930, twelve percent of this country's eighteen-year olds were enrolled in colleges. The figure was eighteen percent in 1940 and now it is well over thirty per cent. In Britain today the corresponding figure is about five per cent. The last time the subject was widely discussed was in 1948 when President Truman's Commission on Higher Education issued their unfortunate report. It was unfortunate because in it terms or slogans were used which, properly defined, everyone must support, but which were associated with realities which everyone must condemn. The terms themselves, "the democratic spirit in education" and "equality of opportunity" are admirable and redolent of the Eighteenth Century. They would have aroused as much enthusiasm in Thomas Jefferson and Benjamin Franklin as "life, liberty, and the pursuit of happiness," but the Founding Fathers could not have grasped the implications they would have in 1959. They could not have understood the mass education of today any more than they could our mass production in Detroit; still less could they have grasped the modern failure to distinguish between the process of making a machine and the process of making a man. What the Commission on Higher Education was really calling for was educational inflation, educational fraud. They wanted to spread our national culture perilously thin and call it "democracy of education." They wanted to swell the number of incompetents in American colleges and call it "equality of opportunity."

Small effort was made to enumerate or analyze our present startling failures at the high school and college level, failures which would be mutiplied and intensified if all the recommendations of the commission had been carried out. Instead, they offered a panacea for the intellectual and moral crisis through which the country was passing and is still passing after 45 years of war. Their panacea was more and more advanced schooling, even if it be-as it must be-inferior. Briefly, they wanted, by 1960, 4,600,000 students in higher education in place of the 1,500,000 that was normal before the war, and the 2,254,000 that was forced on us at the close of the war with a peak load of 1,000,000 veterans. They called for a faculty of 350,000 persons, although we have not half that number qualified to teach at the university level. They wanted a physical plant of 713,000,000 square feet, and a budget of federal assistance amounting to $2,587,000,000. The budget was the item of least concern. In fact, the excellent report on "Education for the Age of Science", submitted last month by President Eisenhower's Science Advisory Committee, called for much greater sums and justified its demands. It would double the $18,000,000,000 now being spent on higher education, but nowhere does it suggest that we double the student body. It does not throw slogans around. It doesn't mention "democracy in education" or "equality of opportunity". Its plea is to spend more on those, who because of their industry and ability, deserve the sacrifice. There was no suggestion that we have to prepare for the whole mob that finishes high school every year.

It is true that on the basis of the World War II Army General Classification Test, the experts expected to have 4,600,000 ready for higher education in 1960, but that just shows the fallibility of tests. Actually the numbers this year came to 3,258,556 showing an increase of 6% from the year before. With a similar increase next year, the total for 1960 will be a million less than the estimate of the Truman Commission, but even so, on the basis of fifty years' experience with our American high school produce, I know no educator with reasonably high ideals who would admit that we have half that number ready for higher education. The effects of such misplaced optimism are only too obvious. Its defenders try to tell us that college standards are not diluted when the masses pour in—at least not necessarily. That's what they said about Lend Lease: it would not necessarily lead to war. That's what they said about Prohi-

bition: it would not necessarily dull the conscience of the people. That is what wild speculators have always said about unsecured currency: that it would not necessarily lead to financial ruin. But in all these cases we have always dealt with the loftiest probabilities. When the masses poured into the high schools forty years ago, the old high schools did not bring the masses up to their level. The masses brought the high schools down to theirs. At the close of the Second World War, our colleges and universities had just a taste of what will be in store for them if educational inflation is unchecked. By 1948 we found ourselves understaffed and overcrowded, conducting a program which was sneeringly called "a silent conspiracy to defraud the public and the Government." That, of course, was an unfair criticism since the terrific pressure to take more students than we wanted had come to us from the G o v e r n m e n t and the public. More than once, the Commissioner of Education of New York and Governor Dewey himself called me on the phone to say, "Can't you take five hundred more in this school or two hundred more in that?" It was patriotism at that time to do what we could in a situation that was regarded as a temporary phase, but the promoting at this time of anything like 4,600,000 products of American high schools into higher education will suffocate with mediocrity any college or university that gets on the bandwagon of inflation.

We need to be on our guard against those dangerous slogans "democracy of education" and "equality of opportunity." It has been a normal condition of American colleges for years that one-third of the so-called students were in the way, cluttering up the place and interfering with other people's intellectual progress. If we need more room to take care of the expected population boom from post war babies, let us create a good part of that room by clearing out the useless lumber that we have already on our campuses. That will be like adding one new institution to every two in existence.

If we could confine our efforts to the educable, we might find enough good teachers to educate them. But the proper screening of students is a principle which the American people find difficult to accept. It is not supposed to be democratic. The American public still regards advanced study as a kind of tribal initiation with no intellectual implications. This is a situation for which I can offer no immediate solution except to suggest that we appoint another Senate Investigating Committee.

But meanwhile, what more heartening sight could a worried American citizen look upon than a large representative body of men like you whose lives are dedicated to the elimination of fraud?

PRESIDENT BLANCHET: Thank you, very much, Father Gannon. I have no words to adequately express my appreciation, but you know I do appreciate it.

I have said to you before, and I repeat, with all sincerity, that the real sinews of this Association are the respective committees whose members labor so diligently in order that this Association might evidence substantial progress. At this time, it gives me particular pleasure to introduce to you the chairman and the vice-chairman of each of the following committees. I will ask upon the calling of their names that each chairman and vice-chairman stand and remain standing until the list has been completed: Accident and Health, Hugh Reynolds, Indianapolis, Lowell Knipmeyer, Kansas City; Automobile Insurance, Meyer Fix, Rochester, Carl Johnson, New Orleans; Aviation Insurance, Gerald Hayes, Jr., Milwaukee, Percy McDonald, Memphis, who, unfortunately cannot be with us today; Casualty Insurance, George Morrison, New York, Alvin Christovich, New Orleans; Convention Site, Ernest Fields, New York, John Kluwin, Milwaukee; Convention Transportation, Alfred Morgan, New York, Joseph Griffin, Chicago; Federal Rules, Josh Groce, San Antonio; Fidelity and Surety, Paul McNamara, Al Morgan, Columbus and New York; Finance Committee, Frank O'Kelley, Tallahassee, Forrest Betts, Los Angeles; Financial Responsibility, Marcus Abramson, New York, Robert Ely, Philadelphia; Fire and Inland Marine, Don Clausen, Chicago, Clarence Conklin; Home Office, Thomas Wassell, Dallas, C. A. Des Champs, San Francisco; Industry Cooperation, John Kluwin, Milwaukee, Ed Bronson, San Francisco; Journal Committee, Gordon Snow, Los Angeles, Josh Groce, San Antonio; Life Insurance, Price Topping, New York, Ed Raub, Indianapolis; Malpractice, William Martin, New York, Lee Bradford, Miami; Marine, Stanley Long, Seattle, Wilder Lucas, St. Louis; Membership Eligibility, Paul McGough,

Minneapolis, Pat Eager, Jackson, Mississippi; Memorial Committee, F. B. Baylor, Lincoln, Nebraska, Duncan Lloyd, Chicago; Practice and Procedure Committee, Charles Gould, Los Angeles, Laurent Varnum, Grand Rapids; Senior Advisory Committee, John Kluwin, Milwaukee; Workmen's Compensation, William A. Kelly, Akron, George Schlotthauer, Madison; Special Committee on Nuclear Energy, Harley McNeal, Cleveland, Wally Sedgwick, San Francisco; Contingent Fee Committee, John Graham, Hartford.

I will now call the convention committees: General Entertainment Committee, George Schlotthauer, Tiny Gooch, Mrs. George Schlotthauer, Mrs. John Kluwin; Convention Program Committee, Tom Phelan and Price Topping; Open Forum, George Whitehead and Gerald Hayes, Jr.; Convention Publicity Committee, John Hamilton; Men's Committee on Reception for New Members, Lester Dodd and Forrest Betts; Ladies' Committee on Reception for Wives of New Members, Mrs. J. A. Gooch, Mrs. Alvin Christovich, Mrs. Stanley Morris; Men's Golf Committee, Ernest Fields and Orrin Miller; Ladies' Golf Committee, Mrs. Lester Dodd, Mrs. Stanley Burns; Men's Bridge and Canasta Committee, J. H. Gongwer and Duncan Lloyd; Ladies' Bridge and Canasta, Mrs. Kenneth Cope, Mrs. Duncan Lloyd; Committee on Junior Entertainment, Mrs. Egbert Haywood and Mrs. Alfred Morgan.

These, my friends, are the ladies and gentlemen who have served so faithfully and directed so ably the committee work. We extend our warmest thanks to you. (Applause.)

I now recognize your retiring president, Mr. Forrest Betts of Los Angeles, California, for the purpose of proposing an amendment to the bylaws. Notice thereof was published in the April issue of the Journal.

Amendment to By-Laws

Presented by
FORREST A. BETTS
Los Angeles, California

PRESIDENT Blanchet and members of the Association: As President Blanchet has indicated, the by-laws, in case you do not remember, require that proposed amendments shall be published in the April edition of the Journal, or, to be more accurate, a certain length of time before the annual meeting, so that each of you will have had the opportunity to read the amendments. I will proceed with the assumption that you have read them and will merely explain what has been done, so that you may understand it.

The amendment, as proposed, appears at page 180 of the April edition of the Insurance Counsel Journal. I will start a little bit at the other end, so to speak, of the amendment to indicate that proposed amendment number four, section 6, is merely a repetition of Section 4 of Article IV, as it now stands, because of the interposition of the other sections in the new amendment.

Section 2, which amends — or, proposal two, which amends Section 4, concerning the term of office of the Treasurer, is taken verbatim from the last sentence in section three, as it now stands, by which it is provided that the term of the Treasurer shall be coincidental with this year. That is not a change. The only change actually which is accomplished by the proposal is that it proposes to change Section 3 of Article IV and to add Section 5, which will accomplish a purpose which we feel has been needed for some time.

I will not be too long on this, but merely to give you a brief outline of the historical picture: at the convention in San Francisco, we, for the first time, eliminated one of the then three vice presidents. In place thereof, we instituted, by amendment to the constitution and by-laws, a system of electing a president-elect.

This left two vice presidents to be elected each year. For the benefit of those who may not have served on the Executive Committee, the work of the committee starts immediately after the convention, in the afternoon of the third day. A new member very often found himself, as one of the very fine new members did, on the high seas, or practically on the high seas, on his way to Hawaii, so he missed that meeting. Even if he attended it, he was new, the business was new and the procedure was new.

He then attended a Mid-Winter Meeting, and got to know what the business of the Association was, and got himself well indoctrinated in the affairs of the Association.

Then, he attended the meeting, the last meeting of this year, the afternoon immediately preceding the convention, and he found frustration in his efforts, in the fact that he had nothing more to do.

We felt we were losing a great deal of talent in this way, by bringing a person in new and giving him one year, and, in fact, only permitting him to participate actually in the Mid-Winter Meeting once.

Therefore, the purpose of the amendment is to avoid that situation. We had difficulty, because we did not want to increase the number of the Executive Committee. So, what we have suggested is to provide that this year there shall be two vice presidents elected, one for one year, and one for two. Then, thereafter, there shall be elected one vice president to serve for two years on each occasion.

We believe that this is to the benefit of the Association. Therefore, in order to get it before the convention, I move you, President Blanchet, that the proposed amendment, as published in the April edition of the Insurance Counsel Journal, be adopted.

(The motion was seconded, was put to a vote, and was carried.)

PRESIDENT BLANCHET:

The Open Forum and Panel Discussion Committee has devoted a great deal of hard work into producing an outstanding program. I realize that the golf course might possibly be a diversion, but I urge

each one of you, in appreciation to the hard work that has gone into this program, if for no other reason, to attend the Open Forums. You will hear further details, at this time, as I invite Mr. George Whitehead, chairman of the committee, to the dais.

MR. GEORGE I. WHITEHEAD, JR.: Mr. President, ladies and gentlemen: First of all, I should like to say that your Open Forum Committee regrets very much that one of its very active members, Percy McDonald, Jr., could not be with us today. I understand that he is recovering after serious surgery.

With respect to our two sessions, some very fine people have come a long way out here to Western Canada to make a valuable contribution to this Thirty-Second Annual Meeting. We think that you will find it a rewarding experience to hear what they have to say.

I think that the program today is self-explanatory. It is going to be on aviation, and we have two outstanding men who will present two facets of the investigation phase of the major airplane accidents. Thank you,very much.

PRESIDENT BLANCHET: Thank you, George.

The General Entertaiment Committee is co-chaired by Mr. George Schlotthauer and Tiny Gooch. I would like to invite Mr. Schlotthauer at this time to make any announcements he may wish with respect to the program for entertainment at this meeting.

(Mr. Schlotthauer made announcements about the entertainment program.)

Now, the next order of business is the appointment of the Nominating Committee. I hereby appoint Mr. Forrest Betts of Los Angeles, California, to the important role of chairman of the Nominating Committee.

The remaining members of the Nominating Committee are: Edward A. Cowie, Hartford, Connecticut; Edward O'Neill, Fon du Lac, Wisconsin; Warren Reed, Boston, Massachusetts; Alvin Christovich, Jr., New Orleans.

I repeat: Forrest Betts, chairman, Edward Cowie, Edward O'Neill, Warren Reed, and Alvin Christovich, Jr.

Mr. Betts will now make an announcement with respect to the meetings of the nominating committee.

MR. FORREST BETTS: The first meeting will be at 2:30 today and will continue until 4:30 unless there be occasion to go beyond that. Those of you that are familiar with this procedure, which is one of the most democratic that I know of, and those of you who have had much history, know that sometimes we get through in a hurry and sometimes we don't. But, in any event, that will be today, and then this evening, at 9:30 p.m., we will open the committee room again for anyone else who may wish to be heard today.

Tomorrow, July 1st, the only scheduled meeting of the Nominating Committee will be at 10:00 a.m. Now, I don't know why they should have selected those times exactly. I suppose it must be history, but I thought perhaps it was to keep me from being in the aviation open forum, in view of the fact that I have just succeeded in losing a case for $450,000. In any event, come one, come all.

PRESIDENT BLANCHET: Thank you. Is there any further business to come before this meeting?

If not, we shall adjourn.

General Session

JULY 2, 1959

THE GENERAL Session of the Thirty-Second Annual Meeting of the International Insurance Counsel Association reconvened at 9:45 o'clock, a.m., in the Cascade Room of the Banff Springs Hotel, President Blanchet presiding.

PRESIDENT BLANCHET: Members of the International Association, ladies and guests: The concluding session of the thirty second annual convention of this Association will now come to order. In a matter of hours, many of us will be leaving for far distant points, to resume the practice of law. At this, our final session, it is entirely appropriate that we have on the concluding day, as we did on the opening day, a prayer to Almighty God for His continued blessings. Unfortunately, by virtue of a prior engagement, Father McGuinness will not be with us this morning. However, if you will please rise, we will have a moment of prayer.

(Silent prayer.)

Thank you, kindly. Be seated.

You have heard a great deal about the chairmen and vice chairmen, but I want to initiate an innovation.

We shall now invite the ever popular Tiny Gooch to be the master of ceremonies in connection with the awards of the prizes of the various tournaments. Here is Mr. Tiny Gooch from – what state is it, Tiny?

MR. J. A. GOOCH: Alaska.

PRESIDENT BLANCHET: Mr. Tiny Gooch from Alaska. (Laughter.)

(Mr. Gooch, Mrs. Lester P. Dodd and Mr. Ernest W. Fields, presented the tournament prizes.)

PRESIDENT BLANCHET: The Chair will now consider any unfinished business. Is there any unfinished business which may occur to you? Is there any new business?

The next report is of a serious vein. It is indeed proper that we hear the report of the Memorial Committe which will bring back to us, I am sure, the fondest memories of some of our very closest and dearest friends.

Mr. Bill Baylor, of Lincoln, Nebraska, will now give the report of the Memorial Committee.

Report of the Memorial Committee—1959

F. B. BAYLOR, *Chairman*
Lincoln, Nebraska

A GREAT dominion and a great nation present to the world an example of harmony and helpful reliance, one upon the other. We are met upon the soil of that dominion and know full well that the unity which binds our countries has a counterpart in the unity which binds the members of this association in friendship and a common purpose. We here assembled reaffirm that friendship and common purpose and acknowledge the part which has been taken in their promotion by those whose voices have been stilled by an inexorable hand. To them we say in the words of Ozora Davis:

"I love the man who dares to face defeat
And risks a conflict with heroic heart;
I love the man who bravely does his part
Where right and wrong in bloody battle meet.
When bugles blown by cowards sound retreat,
I love the man who grasps his sword again

And sets himself to lead his fellow men
Far forward through the battle's din and heat.
For he who joins the issue of life's field
Must fully know the hazard of the fray,
And dare to venture ere he hope to win;
Must choose the risk and then refuse to yield Until the sunset lights shall close the day And God's great city lets the victor in."

and in parting add:

"Your diligent advocacy, your steadfast loyalties and your devoted friendship have created an example which continuously shall guide us. We thank you for the relationship which you and we have enjoyed. It is not ended with your passing."

Death has turned another page on which are written the following honored names:

Vayne M. Armstrong, Indianapolis, Indiana
George Burns, Rochester, New York
Laurence S. Coe, Rice Lake, Wisconsin
Jo D. Cook, Seattle, Washington
N. D. Denson, Opelika, Alabama
W. L. Dutton, Cedar Rapids, Iowa
Wayne Ely, St. Louis, Missouri
Lynn M. Ewing, Nevada, Missouri
Thomas V. Geagan, Providence, Rhode Island
W. C. Gowan, Dallas, Texas
Daniel J. Gross, Omaha, Nebraska
William A. Gunning, Providence, Rhode Island
H. Clifford Harper, Sioux City Iowa
William D. Knight, Rockford, Illinois
E. T. Lamkin, Monroe, Louisiana
Eugene D. McLaughlin, Peoria, Illinois
E. A. Marshall, Huntington, West Virginia
Alfred B. Nathan, New York, New York
Leland H. Notnagel, Toledo, Ohio
Benjamin B. Priest, Boston, Massachusetts
Felix A. Raymer, Houston, Texas
Clarence B. Runkle, Los Angeles, California
Forrest Stuart Smith, Richmond, Virginia
Oscar T. Toebaas, Madison, Wisconsin
William H. Watkins, Jackson, Mississippi
John A. Weber, Medina, Ohio

Let us stand and in doing so ratify a resolution which now is submitted:

BE IT RESOLVED: That humbly and sorrowfully we accept the Final Judgment and in sadness deplore the loss which has come to all who have enjoyed the fruitful and irreplaceable relationships now transformed to unending memory. Edwin Markham has given utterance to the sentiment which hereby is adopted as our own:

"We are given one hour to parley and and struggle with Fate,
Our wild hearts filled with the dream, our brains with the high debate.
It is given to look on life once, and once only to die;
One testing, and then at a sign we go out of the sky.
Yes, the task that is given to each man, no other can do;
So the errand is waiting; it has waited through ages for you."

Mr. President, in solemn convocation we have expressed that sorrow which comes with the departure of true and faithful friends and have submitted their names for indelible entry on the scrolls of this association.

The Memorial Committee respectfully submits its report.

F. B. Baylor, *Chairman*, L. Duncan Lloyd, *Vice-Chairman*, Pat H. Eager, Jr., Gerald P. Hayes, Joseph A. Spray, George W. Yancey.

PRESIDENT BLANCHET: We now come to one of the outstanding highlights of this entire meeting. I will call upon John Kitch of Chicago to come to the dais for the purpose of introducing to you the next speaker. John Kitch.

MR. JOHN R. KITCH: Members of this Association, Mr. President, ladies and guests: When our president called to invite me to introduce our next speaker, I was delighted and greatly honored. I am sure that every member here envies me this privilege.

The introduction itself is particularly easy to make, for a great many of you have enjoyed his friendship and other later members of our Association know of him by reputation. If I spoke all that is in my heart, and I am sure is echoed in yours, I could probably take all the time allotted to the speaker. This I am not going to do. But, I do feel that a few facts concerning him should be reviewed.

Our subject is the product of our great midwest. His formal education was concluded at two of our great universities, Northwestern and Wisconsin. During World War I, he served his country as a pursuit pilot in the Armed Forces.

After receiving his Bachelor of Laws degree in 1921, he became associated with Quarles, Spence and Quarles, a prominent law firm in Milwaukee. At just about this point in his career, he won a great success, I believe the most important of his life, when he persuaded a lovely and charming young woman to become his wife. She remains at his side today, the mother of his successful son, Kenneth Grubb, Jr., a doctor of medicine, and of his lovely daughter, Barbara, now Mrs. William White. From these two sources, he has learned something of the delights of being a grandparent.

Many of us, during our years in the Association, have been privileged to enjoy the charm and graciousness of his life companion, who served as first lady of our Association with dignity and great distinction.

Much of our speaker's career has been spent as a successful trial lawyer in both state and federal courts. In law school, he was elected to the Order of the Coif. He is a member of the American College of Trial Lawyers, the American Bar Association, and the Federal Bar Association for the Seventh Circuit. He is a member, also, of the Milwaukee and Wisconsin Bar Associations.

Prior to his elevation to the bench, he was a member of this Association and, in 1948, served as its president. He has served with distinction on many committees of the associations to which he belongs, and has contributed brilliantly to his profession by his speeches and professional papers.

The crowning honor which can come to any lawyer came when his brother lawyers joined in urging his elevation to the federal bench. He was sworn in as a judge of the United States District Court for the Eastern District of Wisconsin on June 27, 1955, and has brought to that bench great dignity, ability, integrity and industry. Today, emanating from his bench, are opinions indicating his profound knowledge of the law, broad experience, common sense and a delightful sense of humor.

I now present to you a former member of this Association, who returns to us today, the Honorable Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin. Judge Grubb.

(The audience arose and applauded.)

False Fears

HONORABLE KENNETH P. GRUBB*

PRESIDENT Blanchet, members of the Association, and your guests:

In the early 1920's, a very distinguished trial judge in northern Wisconsin told me, "A jury verdict is a quotient of the prejudices of twelve people."

I can well recall going to small towns in Wisconsin where farmers, driving Model "T" Fords, had run into Cadillacs owned by city men. The farmers always got the verdicts even if the Cadillacs were standing still!

Notwithstanding that human nature by way of prejudices and favoritisms frequently colors and enters into verdicts, nevertheless juries have been the bulwark of Anglo-Saxon freedom. They have been the protection of the citizen from the government as well as from other citizens.

Our forefathers' reliance on juries is shown by the fact that Article III of the Constitution expressly provides for trial by jury in criminal cases. Almost immediately after its adoption, the Constitution was amended, and the seventh amendment in the Bill of Rights provides that the right of jury trial in civil cases where the controversy exceeds twenty dollars shall be preserved, "and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

One should not call the so-called "juries" that sat in the trials preceding the guillotine in the French Revolution "juries" in our sense of the word. They were hand picked and intimidated. Although the saying, "We'll give him a fair trial and then we'll hang him," did not, as far as I know, come from that procedure, it might well have.

Notwithstanding the fact that prejudice so often affects verdicts, we have as yet not found any safer or more fool proof way of resolving disputes between the government and its citizens and as between citizens.

Unfortunately, prejudices exist based upon many things such as race, religion, personal appearance, mannerisms, dialects, and geography. The latter type of prejudice is slowly disappearing because of the automobile and the extensive travel in America. People from the south are getting acquainted with people in the north and vice versa, and those in the east are getting acquainted with people in the middle west and far west. Nevertheless, there still remains some accent or manner of speech in certain sections of the country which does not ingratiate those persons to jurors from other parts of the country. Our forefathers, no doubt, had this in mind when they provided in Section 2 of Article III of our Constitution, with reference to judiciary, that the judicial power shall extend to all cases in law or equity arising under the Constitution, the laws of the United States, the treaties made, and to controversies between citizens of different states. This constitutional power has been implemented by acts of Congress defining jurisdiction of Federal courts in cases involving diversity of citizenship.

One of the efforts which has been made to minimize the effect of jury prejudices has been the provisions in the laws of several states and in the Federal Rules of Civil Procedure permitting cases to be submitted on special verdicts. I am informed that with the exception of four or five states, special verdicts are not used much, if at all. In general, the bar in the other states is not acquainted with this procedure and looks upon it as something complex, difficult, and unusual.

The special verdict is an ancient form of jury verdict. Looking back into history, a modern American might describe the reasons for its conception as an attempt to "pass the buck."

In the 13th Century, if a jury misapplied the law to the facts of a case, the jury itself was tried by a higher body and found attaint. This meant that each member was guilty of perjury and subject to a severe penalty, notwithstanding the fact that his error was based upon a misconception of a nice point of law. To relieve itself of this responsibility, the jury soon conceived the idea of bringing in a special verdict. Thus, the jury would merely state to the judge

*United States District Judge, Eastern District of Wisconsin, Milwaukee, Wisconsin.

the facts as found by it, thereby shifting to the judge the responsibility for a correct interpretation and application of the law.

Possibly it was here that the judicial reluctance to engage in dictum was born for at that time judges too were subject to a penalty for mistakes. In one year King Alfred hanged forty-four judges for their false judgments.

With the passing of time our judicial system eliminated those penalties for mistake, although there still may be some who would like to revive the old custom and hang the judge for some of his decisions!

Time has also suppressed our concern over the accuracy of jury verdicts. We have solved the problem of effective fact finding in much the way the ostrich solves its problem of fear. Instead of sand, we use the general verdict.

The general verdict is the merger into a single answer of all matters, however numerous, whether law or fact. As Professor Edson R. Sunderland puts it:

> "There are three unknown elements which enter into the general verdict; (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it can rarely be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially myterious as the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom."[1]

Judge Jerome Frank developed three theories explaining the general verdict.[2] The first he called the "Official Theory." This is also described as the "Naive Theory," according to which the judge and jury constitute nicely divided tribunals, neither encroaching upon the other's domain. The jury under this theory finds the facts and faithfully applies the law as given by the court.

The second he called "The More Sophisticated Theory." Herein the jury engaged in legal reasoning, applying the law to the facts to reach the general verdict which is a composite of both law and fact—law which the jury thoroughly understands and intelligently applies.

The third is called "The Realistic Theory." This theory is based upon what anyone can discover by questioning the average juror. Frequently, if not usually, juries are neither able to nor do they attempt to apply the instructions of the court; rather, juries are more brutally direct. They decide that they want John Doe to collect $5,000.00 from the railroad company, or that they do not want pretty Nellie Brown to go to jail for killing her husband, and bring in their verdict accordingly. Ordinarily, for all practical intents and purposes, the judge's views on the law might just as well have never been expressed.

Although Judge Frank pulled no punches, it cannot be denied that the general verdict confers upon the jury a vast power to commit error and do mischief. It is loaded with technical burdens far beyond the jury's ability to perform. It is further confused by adding, rather than segregating, issues.

If the jury can understand the general charge, there still remains the all too frequent instance where the court's instructions are not accurate. Dean Leon Green suggests that erroneous instructions are the greatest single source of reversible error.[3] Further, the more accurately a general charge is written, the more difficult it is for a laymen to understand it. The anomaly is that the necessity for the general instruction creates pitfalls over legal distinctions which appellate courts will consider as requiring new trials, which distinctions have no effect on jury deliberations. Such reversals result in an enormous waste.

It has been said that, "Time, money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language."[2] For the most part the general instruction is ritual.

In a very practical paper on the subject,[1] Sunderland relates that jurors are secondhand dealers in law and must get it from the judge. They can supply nothing accurate themselves; they are a mere conduit pipe through which the court supplies the

[1] 29 Yale L.J. 253.
[2] Frank, *Law and The Modern Mind* (1930).
[3] Green, *Judge and Jury* (1930).

law that goes into the general verdict. While the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.

One who has never studied a science cannot understand or appreciate its intricacies. The law is no exception to this rule. The very theory of the general verdict is predicated upon a premise which makes practically certain an imperfect or erroneous view of the principles of law which are to be compounded into the verdict.

To comprehend the meaning of many a legal rule, one requires special training to such a degree that college graduates are required to spend three more years in law school. It is inconceivable that a jury, from merely listening to instructions, could grasp the true import of the judge's words. Legal words have often gained their meaning from hundreds of years of professional analysis in the courts. The jury is as unlikely to get the meaning of those words as it would if the words were spoken in Chinese, Hottentot, or Choctaw. Is it fair to ask a juror to swear to follow instructions he cannot understand?

A better instrument could scarcely be imagined for encouraging emotional decisions than is found in the single answer general verdict. The jury's attention is drawn from the issues and focused upon the question, "Who wins?" This emphasis on result appeals to the biases and prejudices of the jurors, an area counsel are often quick to explore.

Mr. Bodin writes that the jurors' reaction to trial counsel "may be more important than the reaction to the client, for the client appears on the stand only during a relatively brief period, while the lawyer is before the jury all the time."[4] A court has solemnly decided that "tears have always been considered legitimate arguments before a jury," that such use of tears is "one of the natural rights of counsel which no court or constitution could take away," and that "indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises."[5]

From such tactics we reap rewards as demonstrated in the case of *MacDonald* v. *Pless*[6] where the jury reached its verdict by averaging the amounts suggested by each and in *United States v. Pleva*[7] where a juror stated in open court that he assented to the verdict because he was physically unable to deliberate longer.

Before we leave this black section of our discussion and head for the brighter future, the general verdict must receive one more attack. In its generality, the verdict must stand or fall as a whole. It is either all right or all wrong because it is an inseparable and inscrutable unit. A single error completely destroys it. When that error occurs, there must be a new trial on the whole. Frequently a new trial, particularly of the whole case, is not necessary where a special verdict is used because of some technical error with reference to instructions on a particular question.

Rule 49 (a) of the Federal Rules of Civil Procedure provides for the use of special verdicts in Federal Courts at the judge's discretion.

Rule 49 (b) authorizes a federal judge to submit a general verdict accompanied by interrogatories upon one or more issues of fact necessary to the verdict. Inasmuch as Rule 49 (b) necessitates the use of general instructions and the hazards that go with them, I shall not comment upon this procedure.

The special verdict authorized by Rule 49 (a) should not be confused with the old common law form of special verdict. At common law when the special verdict was employed, it had to be complete. The jury had to find all the material facts, disputed and undisputed. Nothing could be left for the judge to do except pronounce judgment upon the facts found.

To demand such excessive exactness was to demand the impossible. Such requirements choked the life out of the common law special verdict.

The new federal rules and state statutes take the technicalities and risks out of the special verdict. The purpose of the simpler practice is to escape the unfairness of the general verdict and the technicalities of the common law special verdict.

Rule 49 (a) provides in part:

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. * * * The court shall give to the

[4]Bodin, *Selecting a Jury* (1945).
[5]*Ferguson v. Moore*, 39 S.W. 341, 343.
[6]238 U. S. 264.
[7]66 F.2d 529.

jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

The first benefit of the special verdict is that general instructions, and especially the statement of mere abstract principles of law with which the jury has no possible concern, are wholly omitted. The judge need not, and indeed should not, give any charge about the substantive legal rules beyond what is reasonably necessary to enable the jury to intelligently pass on the questions put to them.

An equally significant value of the special verdict is that direct questions, by their clearness and brevity, can best direct the jury's attention to the essential issues and away from prejudice and favor. With the special verdict the jury has a minimum of consideration of legal problems, and that consideration is sharply pinpointed to a particular factual issue. A new jury panel is more likely to return a verdict free of emotion because often it will not know the effect of its answers. In Wisconsin, in either state or federal court, counsel is not permitted to inform the jury as to the effect of its answers in a special verdict.

In the case of *Thedorf v. Lipsey*,[8] the jury, during its deliberations, requested that the court explain whether the plaintiff could recover if the jury held that the plaintiff was 50 per cent negligent. The court of appeals affirmed the trial court's refusal to inform the jury of the effect of its answers. One purpose of the special verdict is to get the jury to make its findings of fact without regard to their ultimate effect on the result.

Even after a jury becomes seasoned, the special verdict will continue to help keep the jury centered on the real issues.

It is suggested that a special verdict searches the concience of the individual juror, as a general verdict does not, because such are the contradictions in human nature that many who will unite in an unjust or unjustified general verdict will shrink from a specific finding against his judgment and sense of right and wrong. By pinning jurors down to specific questions, they will be more likely to answer free from bias, sympathy, and prejudice.

Thus, the special verdict allows the parties to see what the court has done so that if the judge misapplied the law to the facts, the error often can be corrected without a new trial.

Chief Judge F. Ryan Duffy of the Court of Appeals of the Seventh Circuit told me that there are many instances where on a general verdict the court of appeals had to order a complete new trial, whereas, had a special verdict been used, that would not have been necessary.

Assuming you are interested in the special verdict, how difficult and dangerous is it? It is neither difficult nor dangerous unless it is grossly abused. Fears of those not familiar with the practice that it is complicated, difficult, and hard to undertand are false.

Simplicity and directness, submitting only questions of ultimate fact, is the key to good special verdicts. To be useful, the questions must be kept few in number and simple. What counsel should seek to cover are the ultimate facts which are necessary to plaintiff to recover, or to defendant's defense, and which are in dispute from the evidence. The basic ultimate facts which must be established to prove a case or to prove a defense control the questions. These should be few in number and simply and fairly stated.

I do not suggest that instructions on a special verdict cannot lead to error, but they are less likely to than the more complicated instructions for a general verdict. On two occasions where I have had to apply the law of a sister state, judges from such state have sent me their general instructions. I found it a very simple matter to apply the definitions or legal standards to the terms used in the special verdict.

The courts of Wisconsin and the federal courts try to uphold a given verdict. When a special verdict fails, it is because a mass of unnecessary and confusing questions have been submitted to the jury instead of a few plainly worded interrogatories covering the facts put in issue by the pleadings and controverted on the evidence. For

[8] 237 F.2d 190.

example, in an automobile intersection collision case where contributory negligence is claimed, the special verdict might be as follows:

Question 1: At and just prior to the accident in question, was the defendant, John Doe, negligent in any of the following respects:

(a) With respect to keeping a proper lookout?
ANSWER:_____

(b) With respect to the speed at which he operated his automobile?
ANSWER:_____

(c) With respect to failing to yield the right of way?
ANSWER:_____

Question 2 would read: If you answer "yes" to any of the subdivisions of Question No. 1, then answer the corresponding subdivision of this question: Was the negligence of John Doe as found by you in answer to Question No. 1 an efficient (or proximate) cause of the accident and of the injuries sustained by the plaintiff with respect to:

(a) Keeping a proper lookout?
ANSWER:_____

(b) The speed at which he operated his automobile?
ANSWER:_____

(c) Failing to yield the right of way?
ANSWER: _____

Question 3: At and just prior to the accident in question, was the plaintiff, Richard Roe, negligent in any of the following respects:

(a) Failing to keep a proper lookout?
ANSWER:_____

(b) The speed at which he operated his automobile?
ANSWER:_____

(c) Failing to give a proper signal?
ANSWER:_____

Question 4 would ask about efficient or proximate cause with reference to each subdivision of Question No. 3.

These questions are framed based upon the elements of causal negligence claimed by the parties and about which there is evidence to create a jury issue. When the questions are read to the jury, the court then instructs the jury as to Questions 1 and 3—first, by defining negligence; second, by defining the duty owed under the law in each of the respects submitted. The duties of the defendant are defined with respect to each element submitted in the questions. You will notice that each question is so framed that the burden of proof is on the party seeking an affirmative answer.

The definition of efficient cause or proximate cause is given but once, and the jury is instructed that that is the meaning of the terms as used in both Questions 2 and 4.

In a few states which have comparative negligence, and in cases submitted under the F.E.L.A. or the Jones Act, following the foregoing questions there is submitted one on comparative negligence, the form we use in Wisconsin being as follows:

If you answer "yes" to any subdivision of Question No. 2, and if you also answer "yes" to any subdivision of Question No. 4, then what percentage of the total causal negligence causing the accident, taking the total causal negligence as 100%, do you attribute to:

(a) The defendant, John Doe?
ANSWER:_____%

(b) The Plaintiff, Richard Roe?
ANSWER:_____%

This question is followed by the damage question which may be subdivided as the court desires or may be just one question. Sometimes a general question is asked, such as:

What sum of money will reasonably compensate the plaintiff for the injuries he or she sustained in the accident in question?
ANSWER: $_____

Sometimes the damage question is divided up something as follows:

What sum of money will reasonably compensate the plaintiff for the injuries he or she received in the accident in question:

(a) With respect to medical, hospital, and other care and expense?
ANSWER: $_____

(b) With respect to wage loss?
ANSWER: $_____

(c) With respect to pain and suffering and disability other than wage loss?
ANSWER: $_____

The instructions given to the jury state that to resolve the issues between the parties, the court is submitting the matter to the jury in the form of a special verdict consisting of six questions. The jury is intructed substantially as follows:

"You will carefully consider these questions and answer them according to

the evidence. It is your duty to determine what the facts are. The court's duty is to apply the law. The questions which the court will submit to you are to be answered solely from the evidence received on this trial, considered in the light of the instructions which I will now give. It is your duty to answer each question on its own merits, uninfluenced by any thought as to the final outcome of the case under the law as the court may be called upon to apply the law.

"In answering these questions, you are not to be moved by any feeling as to which party you would like to have win the lawsuit, or by any other motive than that of trying to determine the actual truth in respect to the inquiry contained in each question. Some of the questions are to be answered only in case a previous question is answered in a certain way. You will ascertain this by a careful reading of the questions. You are not to understand by the wording of any question that the court intimates any opinion as to how a question should be answered. How any submitted question should be answered rests with you alone. You must be governed by the evidence. You will accord to the evidence such credibility as, in your best judgement, you believe it entitled to receive."

As a matter of fact, I believe it to be much simpler to instruct a jury on a special verdict than to instruct it on a general verdict because with a general verdict, one has to instruct that if they find this and that, and that if they do not find something else, they are to find for the plaintiff. The same definitions are required, but the jury's attention is not directed specifically to their application.

In some states, a form of question is used substantially as follows:

"Was the defendant negligent in any of the respects alleged in the complaint?"

This form does not take full advantage of the idea of the special verdict. Suppose that the supposititious case above referred to were submitted to the jury on this general question. Four jurors might believe the defendant negligent as to lookout, the other eight not so believing; four more as to speed, the others not believing; some as to right of way, the others not so believing. The answer would be "yes," but the twelve jurors would not have agreed upon any element.

I am informed that in Texas a question is frequently submitted along this line: "Do you find from a preponderance of the evidence that the defendant, John Doe, failed to keep a proper lookout?" This form of question has the advantage of shortening instructions on burden of proof.

Too many questions should not be submitted. To do so would tend to confuse the jury and cause it to lose sight of the really essential issues. Undoubtedly one of the best remedies to prevent this is to determine the essential issues in pretrial conferences as far as possible.

You then ask, what is the standard for too many questions? By this I mean, stay away from subdividing the ultimate questions of fact into detailed evidentiary inquiries. The questions should not be narrowed down to cover disputes in evidence. Questions in the nature of cross-examination of the jury are not necessary or proper.

On the other hand, counsel is not put to the task of submitting all questions of ultimate fact at his peril. Evidentiary questions are not per se the basis for reversible error. So, too, a subject may be submitted in different ways so that the jury may be compelled to look at it from different standpoints without commission of reversible error, but questions of this nature lead to inconsistent verdicts and for that reason should be avoided. A matter which, though put in issue by the pleadings, was not in controversy on the evidence should not be submitted to the jury for decision.

What about the form of the questions? Although the federal rules leave the form of the question to the trial judge's discretion, experience has taught that, where possible, questions should call for a direct answer in the affirmative or negative. As noted earlier, questions should be so worded that the burden of proof is on the party seeking an affirmative answer.

In an old Wisconsin case,[9] counsel violently abused the special verdict process, asking as his eighteenth question:

"Of the sewer pipe that was purchased and laid by the plaintiff, and which he contracted with the defendant to furnish and lay, what is the number of feet of each of the different sizes of pipe which the plaintiff did lay on the inside,

[9] *Ward v. Busack*, 46 Wis. 407, 1 N.W. 107.

and what (is) the number of feet of each of the different sizes of pipe which he laid on the outside of the buildings?" The question was, of course, properly denied.

Questions should be simple, short, require an affirmative or negative answer, and not cover more than one issue. These are easy rules to follow and should make the special verdict a valuable tool, but lest you fear that if you stray from their letter you will be in danger, I want to be quick to reassure you there is margin for error.

In the grand old case of *Mauch v. Hartford*,[10] the Wisconsin Supreme Court devoted twenty-five pages of printed opinion to criticizing the form and number of questions submitted. The trial court had submitted twenty-one questions to the jury in a simple case of a plaintiff who was injuried by tripping on a defective sidewalk. After thorougly castigating the verdict as submitted, the court stated:

> "After a full review of the case, notwithstanding a multitude of errors, we are unable to discover any that can rightly be considered prejudicial to the substantial rights of the litigants. After eliminating from the verdict all useless and erroneous questions, we have left, in some form which, in all reasonable probability, was understood by the jury, questions covering the facts essential to plaintiff's cause of action * * *."

[10]112 Wis. 40, 87 N.W. 816.

The federal courts have adopted a similar rule to the effect that the courts should reconcile inconsistent verdicts, if possible. However, if the jury does bring in an inconsistent verdict, counsel may request the court to have the jury reconsider it. It is not error to direct the jury to retire to reconsider an inconsistent or defective verdict.

The special verdict, like any tool, is useless until it is put into operation. From the survey which I made, I find that probably 85 per cent of the attorneys and judges throughout the country do not use this practice, mostly because of false fears. Some attorneys may prefer to depend upon a jury's inability to understand the law or its temperament to disregard it. For those who desire to get truer verdicts, less influenced by extraneous considerations or prejudices, I sincerely recommend its use.

PRESIDENT BLANCHET: Judge Grubb, please accept our sincerest thanks. May I say at this time, Judge, that your many friends in this Association are delighted to have the opportunity to meet with you and talk over old times.

JUDGE GRUBB: It is mutual.

PRESIDENT BLANCHET: The nominating committee, under the able chairmanship of Forrest Betts, has concluded its important deliberations. I shall now call upon the chairman of the nominating committee to submit his report. Mr. Forrest Betts.

Report of the Nominating Committee

FORREST A. BETTS, *Chairman*
Los Angeles, California

PRESIDENT Blanchet, and members of the Association, and guests, likewise, although this report of necessity is addressed more particularly to the members:

I think that I made some comment, at the beginning of this meeting, about the privilege of the members of this Association to a democratic expression of their beliefs and opinions concerning the selection of those people who are to be the heart of the organization in its progress into the future. The activities, the results and the success of the Nominating Committee, and I say this without any attempt or intention to avoid the responsibilities for it, are the reflection of the men who come before us to a very large extent.

Sometimes there are many who appear before the committee and sometimes there are not.

In any event, it is at least a relief to us to have arrived at our conclusion. We do it with a sincerity that we hope will be understood by those of our friends who could not this year be selected.

I want to have my committeemen stand, as I call their names: Mike Cowie, Warren Reed, Ed O'Neill, and Dick Christovich.

I want to thank you members of the committee for your sincere and cooperative work in accomplishing the result we have.

Your by-laws provide that the president-elect shall take office at the next meeting after he is elected president-elect, or at this meeting. In other words, your president-elect becomes the president, so we do not have to nominate the president-elect, but the head name on the list, of course, for next year is Charles E. Pledger, Jr.

I am not going to take the nominations in what might be called their order, or sequence, because there are some things I have to say about them and I am going to start with the secretary-treasurer and explain to you who may not have known it or may have forgotten, that several years ago, we were in the process of transition from an elected secretaryship to an appointed executive-secretaryship. We were keeping our elective secretary, of course, because of his responsibility to the Association. After that, it became apparent that the work of the treasurer's office should likewise be carried on in the main by the secretary-treasurer, and in that connection, we carried over beyond the period of time that is tacitly set up, or was at that time, for the term of — first, the secretary, and we carried John Kluwin over, or persuaded him to work another year, and likewise, we did the same thing with Frank O'Kelley. It was concluded that it would be the best policy not to have that office held for five years by one man, but that, in order to distribute the officership more among the members, there should be set up something different.

Again, we were in the process of transition, and we persuaded Frank O'Kelley to continue for another year. This was his fourth year. I make this explanation to you, because among other things, Frank O'Kelley is one of the most beloved members of this Association, and it is not that we are seeking a successor for him.

The committee nominates for the office of secretary-treasurer, Mr. George McD. Schlotthauer of Madison, Wisconsin. (Applause.)

This year, as you know, in the light of your amendment to the by-laws, we get the last opportunity that will come for some time at least to nominate two vice presidents, one for two years and one for one year. Your committee nominates for the term of two years as vice president Mr. J. H. Gongwer, of Mansfield, Ohio. (Applause.)

And, for the office of vice president for one year, we nominate Mr. Frank Marryott, of Boston, Massachusetts. (Applause.)

We now come to those people who, as I say, project themselves into, or we project them into, the management, or part of the management, of this Association for the next three years. Your executive committee has been made up of two practicing lawyers from the general field and one company man. Your committee nominates Harold Baile, of Philadelphia, Pennsylvania, Wal-

ter Humkey, of Miami, Florida and Carter Johnson of New Orleans, Louisiana, for the executive committee. (Applause.)

Now, that leaves the last, which probably should have been first, and all-important nomination. I want to say to you that this is always a difficult job. If we could but select members of our nisi prius bench throughout the country from this Association or lawyers of like qualifications and experience, we might be able to follow the example Judge Campbell McLaurin indicated, by eliminating some of the jury trials that we now have. The thing that makes our job so difficult is that all of those who are recommended are entirely, completely qualified. Your committee has given serious consideration to this problem.

Your committee nominates Mr. Denman Moody as president-elect. (Applause.)

MR. JOHN A. KLUWIN: I move that the nominations be closed.

PRESIDENT BLANCHET: The motion has been made that the nominations be closed. Do I hear a second?

(The motion was seconded, was put to a vote, and was carried.)

MR. FORREST A. BETTS: Mr. President, I move that the secretary be directed to cast the unanimous ballot of this convention for the nominees as indicated in the nominating committee's report.

PRESIDENT BLANCHET: You have heard the motion. Is there a second?

(The motion was seconded, was put to a vote, and was carried.)

PRESIDENT BLANCHET: We shall, of course, later and separately introduce to you your president and your president-elect, Charles Pledger and Denman Moody. However, at this time I will ask the men whose names I call to come to the front of the dais and remain standing.

I am honored to present to you your duly elected vice president, for one year, Franklin Marryott of Boston, Massachusetts. (Applause.)

I have been advised that, due to train schedules, Mr. Gongwer was compelled to leave. I shall present him to you in absentia, Mr. J. H. Gongwer of Mansfield, Ohio. (Applause.)

He is your vice president for two years.

I am also honored to present to you your secretary-treasurer, Mr. George Schlotthauer of Madison, Wisconsin. (Applause.)

I shall now present to you those members of the Executive Committee who have just been elected for a three-year term: Mr. Harold Scott Baile of Philadelphia, Pennsylvania; Mr. Watler Humkey, of Miami, Florida; Mr. Carter Johnson of New Orleans, Louisiana. (Applause.)

These men will insure the successful progress of your Association. Let us now show them our elation on their election. (Applause.)

Over the years, each man who has served you in an official capacity has very properly acknowledged the invaluable aid, assistance and comfort extended to him by his life partner. I invite Mr. John Kluwin and Mr. Ernest Fields to act as escorts.

In the waning moments of this meeting, I am filled with gratitude and pride. I am grateful to Lucy beyond words, and I am proud to present to you my wife, Lucy Blanchet. (Applause.)

The next introduction is one which I am so very happy to make. Hers is a popularity that is unsurpassed. Her charm is known to all of us. Her vivaciousness and ready wit have made these meetings ever so pleasant. I shall invite Duncan Lloyd and Wayne Stichter to act as escorts. It is, indeed, a great pleasure to present to you the chaming and lovely wife of your president, Beryle Pledger. (Applause.)

I have now arrived at my last official act, and it is a pleasure. There is no one here who will be able to appreciate fully the tremendous assistance and cooperation rendered to me by Charlie Pledger. Here is a man in the fullest sense of the word, a sterling character, an able lawyer, a great leader and a true gentleman, whose friends are legion. I invite Lester Dodd and Tiny Gooch to act as escorts and, it gives me tremendous pleasure to present to you your president, Charles Pledger of Washington, D. C. (Applause.)

Charlie, I do hereby install you as president of this Association, and I wish you every success and happiness.

I shall temporarily let you use this gavel, but I feel that if you study hard, Charlie, under the tutelage of Al Christovich, and learn to do the Hilo Hop, I will probably give you one permanently next year. (Applause.)

MR. CHARLES E. PLEDGER, Jr.: Last year when I was escorted to the platform at The Greenbrier Hotel, I told you at that

time of my great devotion and dependence upon my lovely Beryle. I told you that she was my severest critic, but that her able advice and her ever sunny disposition were sources of great strength to me. I meant it at that time, and I stand upon the record.

But, there was one thing I didn't tell you, and that was that I am dominated by women. Therefore, I hope that you will pardon me when I ask that our three lovely daughters who are in the room, Lee, Lacy, and Lynne, stand and be recognized. (Applause.)

This is truly a great organization, as has been demonstrated by the fine program, the superb entertainment, the accomplishments, and the grand fellowship on a truly international basis which has existed at this meeting.

Although I am deeply appreciative and conscious of the great honor that has been bestowed upon me in becoming president of this Association, I am also cognizant of the responsibility which is mine to attempt to adequately fill the shoes of the long line of predecessors who have gone before me. This Association has a great potential, not only to its members, but to the industry with which we are identified. It presents a real challenge. I accept that challenge in all humility and with God-given strength and the cooperation of each of you and the other members of this Association, I shall strive to my utmost to maintain the high standards set by Arthur Blanchet and the presidents who have gone before him.

It would be, I guess, fitting if I stood here and told you of my policies and hopes and aspirations for the coming year. But, I will try to take that out in action rather than words. I do, at this time, though, wish to express my continued cooperation with the people who run the Journal, the state editors, the committee, and Bill Knepper, who has done such a magnificent job. It is a fine legal publication. It is widely read and it deserves the support of each of you.

There is one other institution within the Association that I am very much interested in, and that is a luncheon that is held annually in New York City, at the time of the New York State Bar Association meeting. This year, or rather, next year, in 1960, it will be held on January 30 at the Plaza Hotel. That luncheon is run by Price Topping in an able manner. He is assisted by Ernie Fields and Milt Baier. It is an enjoyable occasion. All of you get to New York from time to time, and I urge you when making your plans, to see if you cannot be in New York on January 30, 1960, and attend this affair. There were more than 200 there last year. We already have the acceptance of John Randall, a member of this Association, who will be president of the American Bar Association at the time, to be present.

It was heartening to me when I started to work on my committees to find an unanimous response to requests to serve this organization. Though the time is getting late, and I will not attempt to introduce or to read to you the names of all my chairmen and vice chairmen, but, out of the forty, there were some thirty that were in attendance at this convention, and I would like at this time to express my gratitude to them, and to ask them to rise as I read their names and remain standing until the list is completed:

Accident and Health Insurance, Gordon R. Close and Wiley E. Mayne.

Automobile Insurance, George M. Morrison and H. Bartley Arnold.

Casualty Insurance, A. R. Christovich, Jr., or "Dick" Christovich.

Convention Site, a man who makes a tremendous contribution in so many ways to this Association, Ernest W. Fields, and his co-chairman, John Kluwin.

Fidelity Insurance, Alfred J. Morgan and Bert Haywood.

Financial Responsibility, Marcus Abramson.

Fire and Inland Marine, Clarence R. Conklin.

Home Office Counsel, C. A. Des Champs.

Industry Cooperation, again, that grand leader, John Kluwin.

Journal Committee, Gordon H. Snow.

Life Insurance, Edward B. Raub, Jr. Arthur Crownover, Jr., is vice chairman.

Malpractice Insurance, J. H. Gongwer, who, as you know became our vice president. He had to leave this morning.

Marine Insurance, Wilder Lucas and Lee C. Hinslea.

Membership Eligibility, Paul J. McGough and Pat H. Eager, Jr.

Memorial, the man who did such an excellent job this morning, Bill Baylor, and L. Duncan Lloyd.

Nuclear Energy, a new committee, Harley J. McNeal and Wally Sedgwick.

Practice and Procedure, William M. O'Bryan and Bob Nelson. I think Bob is

on the Rebel Special that left at 8:00 o'clock.

Senior Advisory, Forrest A. Betts.

Workmen's Compensation and Unemployment Insurance,—I am going to have to get a new chairman, because you made him secretary-treasurer, and I wish him well, George Schlotthauer, and Verling C. Enteman.

Ladies and gentlemen, I have been offered a very pleasant task. I will ask Paul McGough and Al Christovich to escort to the rostrum the lovely Teddy Moody, the wife of our president-elect. (Applause.)

Now, I will have escorted to the platform the man who will succeed me as president. He has been a friend of yours and mine for many years, and we know of his deep interest and devotion to the Association. We know that he will do a magnificent job and that our organization will be in capable hands. At this time, I would like to ask Lowell White and Joe Spray to escort Denman Moody, your president-elect, to the platform. (Applause.)

Denman, this Association, by unanimous vote of those present, has elected you president-elect of our organization. Do you accept?

MR. DENMAN MOODY: I do. Mrs. Moody was escorted up here. I love her very much, and to the younger men of the organization, I want to say that to have a successful marriage you have got to be real firm. Early in our life I made Mrs. Moody agree that I would be the boss. I was to make all of the important decisions and she could take up the trivial matters. I woke up here recently, and found we had been married for 29 years and nothing important has happened yet. (Laughter.)

I want to thank all of you for your confidence in me, and I hope that when my time comes that I will be able to do the job that Charlie spoke of.

My law firm in Texas was organized in 1825, and one of our early partners wrote on the records of our organization, and he said this: That our duty is just one; it is to our clients. If material things follow, why that is all right, but don't forget that our first and only duty is, after all, to our clients.

I like to think of the lawyers in this organization as being that type of lawyers also. I think our main and chief duty is to our insurance clients and let's always keep that in mind. Thank you. (Applause.)

PRESIDENT PLEDGER: Ladies and gentlemen, we have had here at Banff, in my opinion, one of the finest conventions that this Association has ever held, and I would be remiss if at this time I didn't ask you to stand with a rousing sound of applause for Arthur Blanchet and for the people who so ably assisted him in putting on this grand affair. Arthur Blanchet! (Audience rises and applauds.)

Is there any other matter of business to come before this Thirty-Second Annual Convention?

If not, I will announce that the Executive Committee will meet in the Angus Room at 2:00 o'clock today. I urge all to be present promptly.

If there is nothing further, God bless you all, and with best wishes for a pleasant summer, I declare this Thirty-Second Annual Convention of the International Association of Insurance Counsel adjourned.

The Reversal of an Unwarranted Trend*

G. ARTHUR BLANCHET**
New York, New York

QUITE fittingly, the reports of your committees and several of your officers over the years have dealt with the difficult problems arising out of personal injury and property damage. There have been many learned articles pointing out the short-sightedness of the theory of the more adequate award, the impracticability of state regulated compensation for automobile injuries and, in addition, extremely helpful analyses of the intricate problems arising under the coverages afforded to persons operating vehicles, maintaining equipment, or selling products. In submitting this report to you, I deemed it appropriate to deal with a segment of insurance of tremendous and vital importance in financial circles. I refer to that intriguing insurance available to banking institutions and the like, commonly referred to as Bankers' Blanket Bonds.

These bonds have been the subject matter of substantial revision in order to meet the tremendously expanding operations of the banking fraternity. One cannot mention the bankers without commenting, at inception, upon the extremely high plane on which difficult problems are discussed and resolved between surety companies and their friends in the banking world. It has been the writer's good fortune to enjoy the breadth of vision and fairness of many bankers throughout this country.

These bonds are intricate, and they must be so because they necessarily deal in part with a factual background wherein certain individuals will cleverly conceive and manipulate certain types of frauds against banks. Time would not permit an analysis of all of the niceties contained in the documents. We shall rather restrict ourselves to a discussion of an outstanding decision somewhat recently handed down by the Supreme Court of Massachusetts. We emphasize this decision for the reason that we believe it represents a reversal of a dangerous trend insofar as construction of one of the very important forms of Bankers' Bonds popularly referred to as Form No. 24.

During the discussion of this case, there will appear a brief summary taken from the language of the Supreme court of Massachusetts as to the content of this particular bond. The case under discussion which has attracted very considerable attention in banking circles is *Rockland-Atlas National Bank of Boston v. Massachusetts Bonding and Insurance Company*, 157 N. E. 2d 239 (1959); (1959 Mass. Advance Sheet 515) hereinafter referred to as *"Rockland-Atlas."*

In *Rockland-Atlas* plaintiff bank sued under a Bankers' Blanket Bond, Standard Form No. 24.

An officer of Guaranty Trust Company of Waltham (Guaranty) telephoned to an officer of the plaintiff requesting plaintiff bank to participate to the extent of one hundred percent in a loan of $25,000 to be made by Guaranty to Nashua Sales Co., Inc. (Nashua). The officer of Guaranty advised plaintiff that he had a financial statement on Nashua which statement was certified to by a letter from a public accountant. Plaintiff bank said that it would participate in the loan to the extent of one hundred percent.

Guaranty thereupon made a loan of $25,000 to Nashua evidenced by a demand note and credited the amount of the loan to Nashua's account. Guaranty's officer then mailed to the plaintiff bank a participation certificate and copies of the purported balance sheet and profit and loss statement of Nashua, and a letter purporting to emanate from a certified public accountant, which stated that the accountant had made an examination and that the statement of assets and liabilities in his opinion presented fairly Nashua's position.

The financial statement and the letter were false. The signature of the certified public accountant appearing upon the letter was not made by said accountant or with his authority.

For clarity, it might be well to set forth very briefly the nature of the Bankers,

*Report of President—1959.

**Of the firm of Bigham, Englar, Jones and Houston.

Blanket Bond considered in said case. We like indeed the summary which the Supreme Court of Massachusetts adopted in analyzing the bond.

The court adverted to clause "E" of the bond which reads, in material part, as follows:

> "Any loss through the Insured's having, in good faith and in the course of business, whether for its own account or for the account of others, in any representative, fiduciary, agency or any other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability on the faith of, or otherwise acted upon any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity, or raised or otherwise altered or lost or stolen, or through the Insured's having, in good faith and in the course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is ultra vires the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents upon or in connection with any securities, obligations or other written instruments and which pass or purport to pass title to such securities, obligations or other written instruments***".

The court then gave this concise analysis of the bond:

> "Clause (E) is one of seven clauses stating losses covered. The other clauses provide coverage (in rough summary except as to clause (A)) as follows: Clause (A) (entitled 'Fidelity'), 'Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss of property through any such act of any of the Employees'; clause (B) ('On premises') loss of 'Property' as defined, through stated causes, broadly stated, 'while .... lodged or deposited within any offices or premises, with certain premises excluded, and loss of or damage to offices, equipment and supplies from stated causes; clause (C) ('In Transit'), loss of 'Property' in transit through causes, broadly stated, and with certain exceptions; clause (D) ('Forgery or alteration'), forgery or alteration of checks and other specified writings of kinds used for or to represent or to obtain delivery of or to receipt for money or property, and of promissory notes; clause (F) ('Redemption of United States Savings Bonds') and clause (G) ('Counterfeit Currency'), losses of kinds somewhat suggested by the titles.
>
> "There are a number of express exclusions including (1 (a)) 'Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A), (D), (E), (F) or (G) 'and (1 (d)) 'Any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clause (A), (D), or (E).' "

Plaintiff made a point that the loss was covered under clause "B" of the bond, the so-called "Property" clause, but placed its chief reliance on the above quoted clause "E" commonly referred to as the "Securities" clause.

The pertinent part of the "Property" clause "B" provides as follows:

> "Any loss of Property through robbery, burglary, commonlaw or statutory larceny, theft, false pretenses, hold-up, misplacement, mysterious unexplainable disappearance, damage thereto or destruction thereof, whether effected with or without violence or with or without negligence on the part of any of the Employees, and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except in an office hereinafter excluded or in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation".

Two pertinent exclusion clauses appear in the policy, to wit, the so-called "Forgery" exclusion clause, and the "Loan" exclusion clause.

The "Forgery" exclusion clause reads as follows:

> "Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A), (D), (E), (F) or (G)".

The "Loan" exclusion clause reads as follows:

> "Any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clause (A), (D), or (E)".

It is quite true that the concise holding of the case is that the certified balance sheet on which the bank relied was not a security, document or other written instrument within the meaning of clause "E".

However, this case, it is respectfully submitted, is an important milestone when one considers other arguments which were made therein.

These important points are: (1) that the loss was not covered under the "Property" clause, clause "B", i. e., "loss of Property through *** false pretenses" for the reason that the "Forgery" exclusion clause eliminated any such cover under clause "B".

The court specifically held that the loss was directly, or at least indirectly effected by means of forgery, namely, the forged signature on the letter purporting to emanate from the accountant.

However, of very substantial importance to those interested in this field, is the fact that the court referred to *Hartford Accident & Indemnity Co. v. Federal Deposit Insurance Corporation,* 204 F. 2d 933 (8 Cir.); *Fidelity & Cas. Co. v. Bank of Altenburg,* 216 F. 2d 294 (8 Cir.); cert. denied, 348 U. S. 952; *National Bank v. Fidelity & Cas. Co.* 131 F. Supp. 121; *Johnstown Bank v. American Sur. Co.* 6 App. Div. (N. Y.) 2d 4.

It would seem quite clear that the court also recognized the fundamental premise that the "Property" clause (B) refers to losses of tangible property. In a footnote, the court in *Rockland-Atlas* commented:

> "See for cases broadly construing clause (B), notwithstanding the suggestions in the bond that losses there referred to are of tangible property lost 'On Premises,' *Hartford Acc. & Ind. Co. v. Federal Deposit Ins. Corp.* 204 F. 2d 933 (8th Circ.); *Fidelity & Cas. Co. v. Bank of Altenburg,* 216 F. 2d, 294 (8th Circ.), cert. den. 348 U. S. 952; *National Bank v. Fidelity & Cas. Co.;* 131 F. Supp. 121; *Johnstown Bank v. American Sur. Co.,* 6 App. Div. (N.Y.) 2d, 4."

As we read the *Hartford* case and the *Bank of Altenburg* case, there was a failure to appreciate that the "Property" clause in the bond does, in fact, indemnify against loss of *tangible* property; it does not purport to indemnify against the extension of credit obtained by false pretenses. See—*Kean v. Maryland Casulaty Co.,* 221 A. D. 184 (1927), 248 N. Y. 534 (1929), and *Degener, et al. v. Hartford Accident & Indemnity Co.,* 92 F. 2d 959 (1937).

It is, of course, fundamental that there is a distinction between a debit and credit transaction and the actual delivery of tangible property.

It is also of interest to note that in *Rockland-Atlas,* plaintiff bank urged the applicability of the decision by the Wisconsin Supreme Court in *Security National Bank of Durand v. Fidelity & Casualty Co.,* 145 F. Supp. 667 (D. C., Wisc.); affirmed 246 F. 2d 582 (7 Cir.), hereinafter sometimes referred to as *"Durand"*, a case which has been extensively discussed in surety and banking circles.

In *Rockland-Atlas,* plaintiff submitted the following points in its brief;-

> "The financial statements were counterfeited, whether or not there was a forgery within the meaning of clause E. The defendant may say that the only kind of forgery contemplated by clause E was that of a signature which would make of the writing an enforceable contractual obligation or evidence of title, or would make the writing valuable of itself. But the words used do not carry such a limited significance; they refer to securities, documents or other written instruments forged as to the signature of any person signing in any capacity. In any event, the contention if

sound is still of no avail, for the word 'or' between the words 'counterfeited' and 'forged' was obviously intended to be disjunctive, and those counterfeited financial statements alone would bring the plaintiff's loss within the coverage of clause E even if there were no forged signature in the case. That is the essence of the ruling in Security National Bank of Durand v. Fidelity & Casualty Company of New York, 145 F. Supp. 667 (D. C. Wisc.); aff'd 246 F. (2) 582 (C. C. A. 7)".

While the court in *Rockland-Atlas* held that the false financial statement was not within the cover, it is of interest to note that the argument of plaintiff bank relating to the phrase "*** counterfeited or forged as to the signature of any maker ***" was not accepted by the court.

Compare, however, the recent decision in *Fidelity Trust Company v. American Surety Company of New York and Hartford Accident & Indemnity Company* —— F. 2d —— (3 Cir) (June 1959) holding that the invoices were counterfeited written instruments.

In evaluating the full impact of the decision in *Rockland-Atlas,* let it be recognized that the plaintiff bank in no uncertain terms presented the *Durand* case to the court. Counsel for the plaintiff bank, in its brief, stated as follows:

"Clause E should be fairly and liberally construed to give effect to this general intent. That approach was adopted in the only judicial interpretation of the clause which we have been able to find. In Security National Bank of Durand v. Fidelity & Casualty Co. of New York, 145 F. Supp. 667 (D. C. Wisc.); aff'd 246 F. (2d) 582 (C.C.A. 7), the bank had made loans in reliance upon assigned invoices and the Court held that the resulting loss was covered by clause E because the invoices were false, even though the signature of the borrower's president on the assignment was genuine.

"In the present case the plaintiff acted in reliance upon financial statements 'which prove to have been counterfeited, and upon a certified public accountant's certificate which proved to have been 'forged as to the signature' of a person signing in that capacity. Clause E was meant to cover documents and instruments usually relied upon in commercial transactions; it lays emphasis upon documents in which the signature is important. It is hard to conceive of any documents more important to a bank which is considering the extension of credit than the financial statements of the borrower, or any signature more significant than that of the certified public accountant on the document which certifies to the accuracy and reliability of the figures contained in such statements".

The decision by the court, however, reads:

"The bond, however, does not purport to cover all losses (see *National Bank v. Fidelity & Cas. Co.,* 125 F. 2d 920, 924); if it did, the entire coverage could have been written in the short and exclusive terms in which the fidelity of employees is covered in clause (A). That there is a large exclusion from general coverage is shown by exclusion 1 (d). We assume that the transaction was a purchase and not a loan so that the exclusion of losses on loans, even if procured by fraud, is not in terms applicable. But lending is a large part of a bank's business, and losses due to fraud are plainly not blanketed by this bond. Only those losses from fraud are covered which are within the broadly specified terms of clause (A) (fidelity of employees) or the more precisely specified terms of other clauses."

As was mentioned in *Rockland-Atlas,* forgery is a common-law crime, and there is no suggestion that the word in the bond is there used only to refer to those acts which may come within the forgery penal statute in the particular jurisdiction where the act occurs.

The question whether a court will look to the forgery penal statute is an interesting and challenging one, but one not to be dealt with herein.

However, it is important to note that the forgery statutes in some states are substantially different than those statutes enacted in New York and Massachusetts. Attention is called to the necessity of a careful analysis of such statutes, to determine whether the statutory reference is to "Whoever ** fraudulently makes **" or to "Whoever falsely makes**".

See, for example, *Provident Trust Co. v. National Surety Corp.,* 138 F. 2d 252

(3 Cir.) (1943) which should be considered only after a realization that, subsequent to said decision, the wording of the bond was substantially changed to insure that such instruments were not within the forgery clause appearing in the basic bond. For the recognition of said change and consequent result, see *Monroe County National Bank of East Stroudsburg, Penna. vs. Century Indemnity Company;* opinion, unreported, by Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Penna – Civil Action No. 12,932 (filed January 28, 1952).

In *Durand* the defendant executed a Banker's Blanket Bond with the "Securities" clause ("E") contained therein, identical with "E" above quoted.

Chain-O-Lakes, Inc. was engaged in the business of buying and selling cheese, eggs and other merchandise. One, Koren, was president and managing agent. In order to finance the business, a duplicate of the original invoice was taken to the plaintiff bank and an assignment to the bank was stamped thereon and signed by Koren on behalf of Chain-O-Lakes, Inc. The bank then advanced eighty percent of the amount of the invoice. When the purchaser of the merchandise paid the amount of the invoice, the proceeds were paid to the plaintiff bank.

There was presented to the bank a number of invoices with the assignments endorsed thereon to the bank. Upon investigation it was found that said invoices which had been assigned to the bank in fact did not represent merchandise sold, as no shipment of cheese or eggs had been made and no original invoices had been sent to the alleged consignees. The invoices purported to represent shipments of merchandise and obligations of the purchaser, but in fact did not represent any shipments or indebtedness.

The only signature on the assignments was that of Koren, and the only documents signed by him were the assignments on the invoices attached thereto. They bore his genuine signature, and the only signature involved in the transaction.

In *Durant,* the court, relying heavily upon a prior decision in the Seventh Circuit, i.e., *Quick Service Box Co. Inc. v. St. Paul Mercury Indemnity Co. of St. Paul,* 95 F. 2d 15, held that the loss was covered. The court said:

> "Plaintiff had for a long time prior to the transactions involved herein, loaned money to 'Chain-O-Lakes, Inc.' on assigned receivables, all of which were executed in a manner similar to the ones referred to herein, and all of which were signed by Irving G. Koren, president. The plaintiff acting in good faith had no reason to believe the said invoices and assignments were fraudulent or unauthorized. The signature of Irving G. Koren was genuine. The invoices were fraudulently prepared by him as the purported invoices and signature of the company, and contain all the elements of forgery; (1) false making; (2) fraudulent intent; (3) instrument capable of effecting a fraud.
>
> A writing over a genuine signature made with intent to defraud constitutes forgery. The falsity in the invoices consisted of the absence of any shipment of merchandise. Plaintiff made the loans in the regular course of business as described herein. The invoices and assignments so presented were in fact unauthorized, false and fraudulent and were published and delivered to the bank in bad faith, for the purpose of defrauding, plaintiff of the sum of $17,341.52".

In *Quick Service Box Co. Inc.,* one, Tawes, was plaintiff's bookkeeper and office manager. He was not authorized to sign checks unless they were complete on their face, signed by Gates or Blum, both vice-presidents, and issued for the purchase of merchandise. He had no authority to draw checks payable to "cash" in an amount exceeding $50. He was not authorized to draw checks for the amounts and purposes of those involved in this litigation.

Tawes presented blank checks to one of the vice-presidents and obtained the signature of one of them on each of the checks. He then filled in the dates, numbers and amounts and wrote on the face the word "cash" as payee. He then countersigned each check below the signature of the company and that of its vice-president and wrote his name on the back as endorser and received the money from the bank. The checks were paid and thereafter returned to the plaintiff at New York as cancelled vouchers.

The court concluded that the signature of the plaintiff appearing upon the face of each check was fraudulently and ille-

gally executed and forged within the meaning of the bond.

In the course of the opinion the court said.

> "Our conclusions are in accord with the statutory provision of New York defining forgery".

The court held that the effectuation of the signature of the drawer by utilization of its printed signature and the addition of the unauthorized signature of the employee with intent to defraud was a publication of a false signature and constituted a forgery of the signature of the assured within the terms of the bond.

It is, however, of interest to note that the United States Court of Appeals for the Second Circuit in New York did not so construe the law of New York. In *Fitzgibbons Boiler Co., Inc. v. Employers' Liability Assur. Corporation, Limited*, 105 F. 2d 893 (2 Cir.) (1939), the court declined to hold that the signatures on the checks which were in fact the genuine signatures of the officers of the corporation were forgeries.

The court particularly referred to *Quick Service Box Inc.* in the Seventh Circuit and said as follows:

"The plaintiff especially relies on Quick Service Box Co. v. St. Paul Mercury Indemnity Co., 7 Cir., 95 F. 2d 15, and Ex parte Hibbs, D. C., 26 F. 421. *But those authorities so far as they are not distinguishable on the facts represent a minority view which we think is offset by the New York cases we have referred to and by the following persuasive decisions from other jurisdictions*: Reg. v. White, 2 Cox, C.L.C. 210; Commonwealth v. Baldwin, 11 Gray 197; 71 Am. Dec. 703; Commonwealth v. Foster, 114 Mass. 311, 320, 19 Am. Rep. 353; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Goucher v. Nebraska, 113 Neb. 352, 204 N. W. 967; 41 A.L.R. 227; Dexter Horton Nat. Bank v. United States F. & G. Co., 149 Wash. 343, 270 P. 799. See also authorities collected in Goucher v. State, 113 Neb. 352, 204 N. W. 967, 41 A.L.R. 227, 229". (Underscoring supplied).

The concept, that if there be fraud perpetrated on a bank a straining to find coverage should follow, is one which should be strenuously opposed.

It is of interest that in *Rockland-Atlas* plaintiff resorted to the' usual argument that the policy should be construed against the insurer in case of ambiguity.

However, it is important to realize that, as was so ably pointed out in the brief of the defendant bank, there is very little necessity or basis for the application of such a rule in the case of Bankers' Blanket Bonds. The reason for this statement is that the draftsmanship—and anyone familiar with the problems realizes the many months of work spent on the draftmanship—is, one might say, an operation participated in by both bankers and insurers. The Surety Association and the American Bankers Association have for many years met in friendly spirit with a view of solving the most difficult problems which constantly arise by virture of the expansion of the banking facilities Anyone who has had the good fortune of meeting with the Insurance and Protective Committee of the American Bankers Association realizes very fully the fair approach which each member of said committee exhibits in wrestling with difficult problems which must be reduced to fair and appropriate phrases and clauses.

It is respectfully submitted that careful appreciation of the true intention of the parties, coupled with clarity of analysis, would lead to the sound and warranted conclusions that the forgery exclusion clause should be given its proper weight and effect in so far as the "Property" clause is concerned, that the "Property" clause indemnifies against loss of tangible property through the enumerated risks, that documents which are false as to contents are clearly to be distinguished from those documents which are falsely made, i. e., forged in the making and that a genuine document, though false as to contents, or a document bearing genuine signatures is not counterfeited or forged as to the name of the maker within the meaning of the Bankers' Blanket Bond.

Report of Practice and Procedure Committee—1959

CHARLES P. GOULD, *Chairman,*
Los Angeles, California

THIS IS A REPORT on the extent to which other jurisdictions in the United States either follow or reject certain principles laid down in *Botta v. Brunner* (1958), 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331, with respect to the extent to which plaintiff's counsel may go in his arguments to the jury in demonstrating and computing damages for pain and suffering. Briefly, it deals with the use of the blackboard in demonstrating on a per diem or other basis the computation of damages for pain and suffering, and also the question of revealing to the jury the amount of damages claimed by the plaintiff, that is, the *ad damnum* clause.

The *Botta* case was an appeal by the plaintiff from a judgment in her favor on the ground of inadequacy of the award and also various other errors. The reversal by the supreme court was based primarily on error in instructions to the jury which required the plaintiff to establish that her injuries resulted from the accident by clear and convincing evidence rather than by a preponderance of the evidence. However, on the appeal, the plaintiff also urged that the trial court erred in refusing to permit counsel to suggest to the jury in summation a mathematical formula for the measurement of damages for pain and suffering. The appellate division agreed with plaintiff's position in this respect. After having ordered a reversal on the ground of error in instruction previously stated, the supreme court took up the latter claim of error, saying: "The problem is of sufficient current urgency to demand our attention."

While plaintiff's counsel used a blackboard in his demonstration to the jury, the supreme court did not base its decision on that ground, but upon the ground that counsel expressed his belief as to the pecuniary value or price of pain and suffering per hour or day or week and asked that such figure be used as part of a mathematical formula for calculating the damages to be awarded. The holding of the court is summarized in the annotation in 60 A.L.R. 2d as follows, at page 1352:

> "The conduct condemned in this case is a suggestion by counsel of a specific dollar value per hour, per day, or per week for pain and suffering concerning which there is no proof in the record and, in the very nature of things, such proof may be impossible. The court does not forbid counsel to point out to the jury the duration of the plaintiff's suffering as disclosed by the evidence, or even to ask the jury to decide what, in their judgment, would be fair compensation for that kind of pain and suffering per hour, per day, etc., provided that counsel does not suggest a specific sum or rate."

In addition, the New Jersey Supreme Court expressly overruled certain previous lower court decisions which held that it was not improper for counsel to advise the jury as to the amount of the *ad damnum* clause of the complaint. In this connection, the court said:

> "In order that the rule announced in the present case may be invested with its full and intended scope, those decisions are expressly overruled. Moreover, it is declared to be improper to send the Complaint to the jury as a matter of course, since it contains the damages demanded. But our holding is not intended to interfere with the use of the pleadings for other proper trial or evidentiary purposes."

It is interesting to note that in at least one case decided by a lower court since the decision in *Botta v. Brunner,* the above quoted portion of the supreme court's opinion was held to be *dictum* and not strictly followed. This case is *Johnson v. Stoveken,* 52 N.J. Super. 460, 145 A. 2d 801, 803, 804, decided November 10, 1958. In that case, the court said:

> "In *Botta v. Brunner,* 26 N.J. 82, 138 A. 2d 713, decided after the trial of the instant case, the Supreme Court by dictum overruled a settled line of authority permitting reference by counsel to the amount sought in the Complaint. . . . .

> Defendant argues that the Botta ruling must be given retrospective affect. He conceded in the argument, however, that the error is not an automatic basis for a reversal, but, as in cases of trial error generally, will justify reversal only if found materially prejudicial in the particular case. . . . .
> Further, mention of the amount sued for would have little, if any, relevancy to the verdict as to liability. Thus, even if the Botta rule were applied here, we would not be led to the conclusion that counsel's mention of the amount of the recovery or the court's charge concerning the matter operated prejudicially in the particular circumstances reflected by the entire record."

There was a dissenting opinion in which the dissenting judge said:

> "Any reference by plaintiff, in his summation, to the amount demanded in the *ad damnum* clause is therefore prejudicial *per se* and hence reversible error. Such error affects a substantial and fundamental right and cannot be cured by a charge of the trial court."

It would thus appear that there is presently some judicial disagreement, even in New Jersey, as to the full effect to be given to the decision in the *Botta* case.

In reaching its conclusions on the matters of arguing a mathematical computation of the value of pain and suffering, and of not revealing to the jury the amount sued for, the New Jersey Supreme Court relied heavily upon Pennsylvania decisions, it appearing that the Pennsylvania rule to the same effect has long been well established. In fact, the subject of this report well could be referred to as the Pennsylvania and New Jersey rule.

In attempting to determine the statutes, appellate decisions, court rules, and practice governing these matters in other jurisdictions, the committee sought answers to the following questions from each state in the Union:

1. Whether the full blackboard "treatment" has been sanctioned by the jurisdiction's court of last resort.

2. Whether it is permissible in personal injury cases to reveal to jurors the amount sued for.

3. Whether these matters are governed by statutes, court rules, or decisions, singly or together.

The committee's summary of the replies received is appended to this report. These summaries are listed alphabetically by states and numerically in accordance with the above questions.

In view of the fact that the precise points involved in the Pennsylvania and New Jersey rule, and encompassed in questions 1 and 2, have not been passed upon by the appellate courts of many jurisdictions, and are not governed by statute or court rule, it is both difficult and dangerous to draw any broad conclusions from the material furnished to the committee. However, the following statements appear to be justified from the summaries appended hereto:

1. The Pennsylvania and New Jersey rule has not been applied in its strictest and broadest sense in the majority of jurisdictions, either in arguing the mathematical computation of the value of pain and suffering, or in revealing to the jury the amount sued for by the plaintiff.

2. In the majority of states, neither matter has been directly passed upon by the highest appellate court of the state. This is particularly true of the question of allowing plaintiff's counsel, in his arguments to the jury, to place his mathematical computation of the value of the pain and suffering on a per diem, weekly, or monthly basis.

3. In the vast majority of states, it is the practice to reveal to the jury the amount sued for by the plaintiff in one form or another, that is, either in the argument, by reading the pleadings, or in the instructions to the jury. In some states, this is required by statute, either by reading the pleadings to the jury, or by instructing the jury that they may not award damages in excess of the amount sued for, thereby necessitating revealing that amount. In most of the states, the practice does not appear to have been questioned in the highest appellate court.

4. In the majority of states, there appears to be no ban against the use of the blackboard for illustrative purposes. This includes such use by counsel during the course of their arguments to the jury. However, in many states, there are appellate decisions which hold either directly or by *dictum* that it is improper for counsel to argue matters which are not in evidence. This raises a nice question as to whether or not these states would ban a mathe-

matical formula for the determination of the value of pain and suffering, whether presented with or without the use of a blackboard. It can be argued that since the nature of the pain and suffering and the time of its duration are in evidence, counsel would be entitled to argue some method of fixing its value. On the other hand, it can be argued, and has been held in some jurisdictions, that since there is no price tag on pain and suffering and since it is a matter for the jury's own determination, it is improper for plaintiff's counsel to express his own opinion, whether by mathematical formula or otherwise.

5. In the majority of states, the matters involved in questions 1 and 2 rest largely within the discretion of the trial court, with little or no control or guidance from statute, court rule or appellate decisions.

It is interesting to note that in one state, Colorado, a defense attorney, in a conference immediately preceding the trial, used *Botta v. Brunner* to persuade the trial judge to rule that plaintiff's attorney was not allowed to use the "full blackboard treatment". The judge stated that since there was no decision covering the matter in Colorado, he would follow the rule announced by the New Jersey court.

This persuades the committee to recommend that other defense counsel do likewise in those jurisdictions where there has been no definite, binding ruling by statute or by decision of the appellate court of last resort.

The paucity of appellate court decisions dealing directly with the two questions in many states, leaves the committee to wonder if defense attorneys have not been too prone to accept the prevailing practice and the discretion of the trial court without appellate challenge in cases which might justify it.

Counsel for plaintiffs are eternally seeking and finding new and revolutionary methods for increasing the "more adequate award".

In the opinion of the committee, it behooves defense counsel to counter this attack by making use, through proper objections in the trial court, of the New Jersey and Pennsylvania rule in those jurisdictions where the question is still open. By making such objection and arguing the point along the lines and on the grounds found in the *Botta* decision, counsel will then be prepared to properly and forcefully present the matter to an appellate court when a case arises which justifies an appellate challenge.

Only by such vigilant action by members of this Association can the advantages of the *Botta* decision and the Pennsylvania rule which preceded it, be incorporated into the law of those jurisdictions where the matter has not been completely foreclosed by statute, court rule, or final appellate pronouncement.

Respectfully submitted,

Charles P. Gould, *Chairman;* Laurent K. Varnum, *Vice-Chairman*; Charles E. Pledger, Jr., *Ex-Officio;* John H. Anderson, Jr., Vayne M. Armstrong, John R. Baylor, Emile Zola Berman, Robert C. Cannada, Frank M. Cobourn, Reid A. Curtis, Robert L. Ernest, Cody Fowler, James T. Haugh, Robert E. King, Edward W. Kuhn, John B. Martin, Marion W. Moore, Robert M. Nelson, William M. O'Bryan, Samuel W. Pringle, Richard P. Tinkham, Victor D. Werner.

Addendum

ALABAMA

1. The Alabama Supreme Court has authorized the use of a blackboard or chart in the argument before the jury in *Roberts Construction Company v. Henry,* 265 Ala. 608, 93 So. 2d 498 (1957); *Clark v. Hudson,* 265 Ala. 630, 93 So. 2d 138 (1957) and *Lauderdale County Cooperative v. Lansdell,* 263 Ala. 557, 83 So. 2d 201 (1955).

In the *Roberts* case the plaintiff's attorney in his opening argument to the jury listed on a blackboard items of damage which he claimed were established by the evidence, and asked defendant's attorney to point out any element of damage plaintiff is not entitled to recover, if he is entitled to recover at all. Defendant's attorney declined to do so. In his closing argument plaintiff's attorney reminded the jury of this and said defendant's attorney must therefore agree that plaintiff is entitled to recover all the elements outlined on the board in the total of $38,256.50 if he is entitled to recover at all. Defendant's ob-

jection on the ground plaintiff was arguing that defendant had admitted that plaintiff was entitled to recover the stated sum, was overruled in the trial court and the ruling affirmed by the supreme court.

There was no indication in the opinion that any, or how much of the figures on the board represented the plaintiff's attorney's estimate of the value of plaintiff's pain and suffering, either in a lump sum, or by the day, week or hour. The court held the plaintiff's age and life expectancy were properly in evidence, but there is no indication whether the jury was allowed to use these figures in figuring pain and suffering, or just for loss of earnings.

However, in *Alabama G. S. Railroad Company v. Carroll,* 84 Fed. 772, 781, 782 (1898), the Circuit Court of Appeals for the Fifth Circuit, on an appeal from the northern district of Alabama, held that an argument by the plaintiff's attorney to the jury that they should determine damages for the plaintiff's pain and suffering at so much a week times the plaintiff's life expectancy should not have been allowed. This decision has not been mentioned by the Alabama courts.

The Alabama Supreme Court has said the amount of damages for pain and suffering is not susceptible of exact measurement or proof and must be fixed by the discretion of the jury, and that attorneys must not, in arguing to the jury, state as facts matters which are not in evidence, especially where proof of the facts asserted would not have been admissible.

The Alabama decisions do not squarely determine whether the plaintiff's attorney may state his opinion of the amount the jury should award for pain and suffering, or whether the jury may calculate an amount for pain and suffering at so much an hour or day upon the plaintiff's life expectancy. However, the statements of the court in the *Roberts* and *Clark* opinions indicate the court takes a liberal attitude toward what may be done and the prospect of a ruling that such argument is erroneous is not good.

2. In Alabama the jury may be informed of the amount of damages claimed in the plaintiff's complaint. See: *Alabama G. S. R. Co. v. Burgess,* 119 Ala. 555, 25 So. 251.

3. There appear to be no statutes or rules of court governing these matters. They are controlled by appellate decision and trial court discretion.

ARIZONA

1. The Supreme Court of Arizona has neither sanctioned nor condemned the so-called "blackboard treatment" in any of its several aspects. Apparently the question has never been presented to the supreme court.

2. In Arizona, it is not only permissible, but virtually necessary, to reveal the amount sued for to the jurors. Arizona Rule of Civil Procedure 39 (b) provides that both the complaint and answer shall be read to the jury prior to the making of opening statements. Thus, the plaintiff's prayer for damages is brought to the attention of the jury at the commencement of the trial.

3. It appears that except for the statute previously stated, the matters involved in questions 1 and 2 are left to the discretion of the trial court.

ARKANSAS

1. The Arkansas Supreme Court has not commented or ruled upon the blackboard treatment or technique. However, in practice, some trial courts do limit its use.

2. Lawyers are permitted to state the amount sued for. The Arkansas Supreme Court has said that it was unnecessary and improper for the trial court to make reference in an instruction to the amount sued for in the complaint, but that if the instruction clearly stated that only such amount as the evidence warranted should be awarded, the giving of the instruction would not be held to be prejudicial or reversible error.

3. These matters are governed by decision and trial court discretion, as there appear to be no statutes or court rules on the subject.

CALIFORNIA

1. Use of the blackboard in the trial of civil cases has long been sanctioned in California. Virtually, every courtroom in the state is equipped with at least one blackboard and chalk. A recent appellate court decision, *Simpson v. Randolph,* 140 Cal. App. 2d 571, 295 P. 2d 528, gave passing comment to the fact that a blackboard diagram was used and did so without criticism of its use. However, there does not appear to be any appellate decision in California dealing directly with the question

of whether or not plaintiff's counsel may use the blackboard to present to the jury an argument on a dollar per day basis with respect to evaluating pain and suffering. In the case of *Roedder v. Lindsley*, (1946) 28 Cal. 2d 820, the supreme court said, at Page 822:

> "In a personal injury action, the plaintiff is entitled to recover such damages as will compensate him for the loss incurred up to the time of trial and also the loss reasonably certain to occur in the future. In assessing general damages, the jury should consider all relevant circumstances, including the age and sex of the injured person, his physical condition before and after the injury, the extent, severity, and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom. Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as reasonable person would estimate is fair compensation."

It is possible that if the exact situation which existed in the *Botta* case were presented to the California Supreme Court, that it might hold such argument, with the illustration on the blackboard, to be error. It has been held error in California for counsel in argument to the jury to comment upon the ability or inability of the defendant to pay, and to also, upon the poverty and necessity of the plaintiff. Therefore, the supreme court might hold the two situations to be somewhat analogous and follow the rule laid down in the *Botta* case.

2. With respect to telling jurors the amount sued for, it is customarily done by instruction to the jury. That such a method of informing the jury is proper is set forth in several relatively early California cases, and has clearly been approved in the recent case of *Sills v. Soto*, 124 Cal. App. 2d 539, 269 P. 2d 98.

3. The matter of the measure of damages in tort actions, instructions to the jury, and the taking of physical evidence, diagrams, and other items to the jury room is largely covered by California code provisions. But there appears to be no statute dealing directly with the use of a blackboard or informing the jury of the amount sued for.

COLORADO

1. The question of the "full blackboard treatment" appears never to have been raised in the Colorado Supreme Court. As a matter of practice, it appears to be within the discretion of the trial courts, some allowing it in full and others to a limited extent. One district judge will allow itemization of actual damages on the blackboard but will not permit the paintiff's attorney to calculate pain and suffering at so much per hour or day.

It is interesting to note that one Colorado defense attorney, in a conference immediately preceding the trial, used *Botta v. Brunner* to persuade the trial judge to rule that plaintiff's attorney was not allowed to use the "full blackboard treatment". The judge stated that since there was no decision in Colorado, he would follow the rule announced by the New Jersey court.

2. The Colorado Supreme Court has not held one way or the other whether it is permissible in personal injury cases to reveal to the jurors the amount sued for. As a matter of practice in the trial courts, it has been allowed in one form or other for many years. It may be mentioned in the opening statement of plaintiff's counsel, and generally is included in the instructions.

3. There are no statues, rules of procedure, or appellate court decisions governing the above matters.

CONNECTICUT

1. In Connecticut the matter of the use of a blackboard by counsel in personal injury cases as an aid to oral argument is largely discretionary with the trial judge. In the federal court it is permitted; however, in the state courts, a majority of the trial judges are now refusing to permit the use of the blackboard upon objections of opposing counsel. With respect to the matter of allowing the plaintiff's attorney to use a mathematical formula based upon so many dollars per hour, per day, or per week in estimating the damages for plaintiff's pain and suffering, it appears that this is within the discretion of the trial

judge. However, it is estimated that the trial court judges are about evenly divided in permitting such argument.

2. As a general rule, the trial courts allow the jury to be advised as to the amount of damages claimed by the plaintiff in the *ad damnum* clause. However, in the recent case of *Cooley v. Crispino* (October 29, 1958) Superior Court of Connecticut, Hartford County, 147 A. 2d 497, the court said:

> "Upon defendant's motion, the court refused to allow the amount of ad damnum to go to the jury. The plaintiff complains that this procedure lowered the amount of the verdict which would otherwise have been given. The ad damnum clause has no probative value; the amount claimed by the plaintiff or counsel is of no concern to the trier. The amount returned must be based upon the jury's application of the rule of fair, just and reasonable compensation which will fully compensate the plaintiff for what he has suffered; *Flood v. Smith,* 126 Conn. 644, 13 Atl. 2d 677; since a more specific or definite standard is impossible. The verdict must be supported by evidence—not upon the claims of counsel."

The court, in its opinion, then quoted from the opinion in the *Botta* case. It appears that this is a minority opinion among the Connecticut judges, as custom has also permitted the jury to know the amount of the ad damnum.

3. It appears that these matters lie largely within the discretion of the trial court. There apparently is no statute or court rule which governs.

DELAWARE

1. Delaware allows counsel in personal injury cases to use the blackboard as an aid to their argument. However, Delaware follows the *Botta* decision and does not allow the computation of damages for pain and suffering to be based upon a per diem value. In *Henne v. Balick,* (Del., 1958) 146 A, 2d, 394, the Delaware Supreme Court said:

> "We think the use by counsel for plaintiff of a mathematical formula setting forth the claim of pain and suffering on a per diem basis was merely a speculation of counsel for plaintiff unsupported by the evidence and was for that reason improper."

2. It appears that Delaware does not allow the amount of damages claimed in the *ad damnum* clause to go to the jury.

3. There are no Delaware statutes governing questions 1 and 2 and apparently these matters are controlled by appellate court decisions.

FLORIDA

1. In Florida, counsel in personal injury cases are permitted to use the blackboard as an aid to the oral argument to the jury. In the past it has been permissible for counsel to argue damages for pain and suffering on a per diem basis but the jury is generally instructed that the amount to be awarded is within its discretion. In *Rattner v. Arrington,* District Court of Appeal of Florida, Third District, 111 So. 2d 82, decided April 9, 1959, the court approved the use of a blackboard as an aid in argument to illustrate items of damages where the use is limited so as not to prejudice the opposing party. The court also said: "The weight of authority favors allowing use in argument of a mathematical formula such as suggesting amounts on a per diem basis when damages for pain and suffering are involved." Cf. *Braddock v. Seaboard Air Line R. R. Co.,* 80 So. 2d 662, affirmed 96 So. 2d 127, and *Andrews v. Cardosa,* 97 So. 2d 43.

2. The jury is permitted to know the amount sued for by the plaintiff in a complaint. This is sometimes brought out on voir dire and usually also in the final argument to the jury.

3. Both of these matters are controlled primarily by the discretion of the trial court. At the present time, there are no statutes or appellate court decisions which govern, except the *Rattner* case above.

GEORGIA

1. The court of last resort of Georgia has not considered or passed upon the use of the blackboard "treatment" in tort actions. As a matter of practice, some Georgia trial court judges permit its use and some do not.

2. In Georgia, the amount sued for in personal injury cases is revealed to the jury in the initial pleadings filed by the plaintiff. In this connection, it is interesting to note that in *Atlanta Joint Terminals v. Knight* (1958), 98 Ga. App. 482, 106 S.E. 2d 417, the appellate court had before it the propriety of certain questions asked the jurors by plaintiff's counsel on the *voir dire* examination. The amount of the *ad damnum* clause was $300,000.00 and in his examination of the prospective jurors, plaintiff counsel attempted to determine if they would be willing to bring in such a large verdict. In the trial court, the judge revised plaintiff's questions and allowed them to be asked in the form of which the following question is a sample:

> "If the defendant was liable and you felt that the paintiff was entitled to recovery under the evidence and the law and you felt that his damages under the evidence and the law amounted to $300,000.00, would that be your verdict."

The appellate court held that this was not improper so long as the questions were worded in such a way as not to constitute an attempt to commit the jury to a verdict of the full amount. However, the appellate court pointed out that the actual verdict was only $40,000.00 so it is possible that if the verdict had been for the full amount of $300,000.00, the appellate court might have felt differently. There was no mention in the opinion of *Botta v. Brunner.*

3. The matter of revealing the amount sued for to the jury appears to be controlled by statute in Georgia while the use of the blackboard appears to lie within the discretion of the trial court.

IDAHO

1. It does not appear that the full blackboard "treatment" has been sanctioned or considered by the Idaho Supreme Court. Apparently, the only appellate statement in this connection is in the case of *State v. Lowe,* (1930), 50 *Idaho* 96, 294 P. 339, in which the court stated:

> "A blackboard was used in explaining the testimony of one of the experts. It was clearly only a demonstration. No juror could have considered it otherwise. We do not think the court erred in its allowance."

2. With respect to revealing to the jurors the amount sued for, it has been the practice in most of the trial courts for the court to instruct the jury on the claims of the parties, normally in the form of a summary of the pleadings, which summary ordinarily includes the amount prayed for. Also, in the court's instructions on damages, the amount asked is usually included as a maximum amount the jury may allow. Formerly, the Idaho Code provided that all of the written instructions shall be carried by the jury to their room for their guidance in arriving at a correct verdict according to the law and evidence. However, this may have been abrogated by the adoption of new rules of procedure which became effective November 1, 1958, patterned after the federal rules. Rule 51 provides in part:

> "After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the cause, the instructions heretofore given may be re-read in whole or in part."

3. With the exception above noted, these matters do not appear to be governed by statute or court rules in Idaho. Apparently, neither the use of the blackboard, or the propriety of plaintiff's counsel discussing the amount sued for in his argument have been passed upon by the Idaho Supreme Court. It would, therefore, appear that these matters rest largely within the discretion of the trial court.

ILLINOIS

1. In Illinois it is discretionary with the trial court as to whether counsel in personal injury cases shall be permitted to use a backboard as an aid to their argument. However, in practice, the blackboard is seldom used for this purpose. Apparently, Illinois does not follow the Pennsylvania and New Jersey rule and allows counsel for plaintiff to estimate the amount of damage for pain and suffering by dollar amounts at so much per hour, per day, or per week. Cf. *Graham v. Matroon City R. R.*, 234 Ill. 483, 84 N.E. 1070.

2. There is no prohibition against allowing the jury to know the amount of damages demanded by the plaintiff in his com-

plaint. This matter is usually referred to in closing argument of counsel.

3. There are no Illinois statutes or decisions governing these matters and apparenty they are controlled by the discretion of the trial court.

INDIANA

1. The only decision in Indiana relating to the use of the blackboard is *Kindler v. Edwards* (1955), 126 Ind. App. 261, 130 N.E. 2d 491. In that case the plaintiff exhibited a blackboard to the jury, during argument, which contained a list of plaintiff's "alleged medical expenses, loss of wages and compensation for pain and suffering, which exhibit was shown to the jury over the objection of" defendant. "Appellee (plaintiff) agreed to remove the board after her argument to the jury. The court sustained the objection in part and directed appellee (plaintiff) to turn the blackboard from the jury after she was through with her opening argument." In its opinion the appellate court said: "Appellant has cited no authority to show that such exhibit was harmful and we find none. In our opinion there was no error in permitting the use of this blackboard." This is not a decision of last resort in Indiana, but the supreme court denied a transfer of this case to it, so presumably it is the law in Indiana at the present time.

2. In Indiana it is held proper to send the pleadings and the exhibits thereto to the jury room. Therefore, the jury would have revealed to it the amount sued for. Further, the court should state the substance of the pleadings in such a manner as to inform the jury as to the issues to be tried. By court decision all stock instructions given to juries in Indiana on damages conclude with the following language: "You may assess such damages ** ** not to exceed the sum prayed for in the complaint; or you may assess such damages as shall not exceed the sum of $50,000, the amount demanded in the complaint."

3. The above matters in Indiana are controlled by Supreme Court Rule 1-7A which requires that a jury be instructed in writing "as to the issues". The practice has been uniformly to consider that this requires the reading of the complaint and answer in substance which involves also, by necessity, the issue of the amount of the demand.

IOWA

1. There is no decision of the Iowa Supreme Court on the so-called "full blackboard treatment".

2. Although there are no specific decisions by the Iowa Supreme Court, it appears to be permissible in personal injury cases to reveal to the jurors the amount sued for, either in argument or by the instructions of the trial court.

3. There are no statutory regulations or rules of court governing these matters. Presumably, they would be determined by decision of the supreme court when presented to it in a proper case.

KANSAS

1. The Kansas Supreme Court has never judicially sanctioned the "full blackboard treatment" as such, but has approved it in piecemeal fashion. In separate cases it has approved a picture, a diagram, and x-rays as proper evidence. In another case, a blackboard of figures has been approved. In trial practice it is customary to use blackboard illustrations by competent witnessess as evidence and counsel may use the blackboard in their arguments to the jury.

2. The sum asked for in the pleadings is always submitted to the jury. The trial courts always summarize the pleadings, evidence and amount prayed for in the instructions given to the jury. This is at least partially santioned by Statute G. S. 60-2909 (5).

3. Both of these questions are ruled generally by court decisions and partially by statute.

KENTUCKY

1. There is no statute, appellate decision, or local court rule which prohibits the blackboard treatment within reasonable bounds. It appears safe to say that in Kentucky the blackboard may be used for the purpose of portraying evidential details in the interest of the edification and guidance of the jury. See *Aetna Oil Co. v. Metcalf* 298 Ky. 706, 183 S.W. 2d 637, affirmed 300 Ky. 817, 190 S.W. 2d 562.

2. The courts use the amount sued for in the instructions to the jury as the limit of the amount of any verdict returned. Jurors may also be questioned on *voir dire* as to whether they would be willing to re-

turn a verdict for the full amount sued for should they feel the evidence warranted it.

As to the "opinions of plaintiff's attorneys as to the dollar amounts, per minute, per hour, per day or in toto", the Committee's correspondent was not too sure that it would be permissible if it amounts to only an *opinion* of the attorney. He doubts if it would be permitted unless it had some basis in testimony.

3. There appear to be no statutes, court rules or appellate decisions governing these matters.

LOUISIANA

1. The full blackboard "treatment" has been sanctioned by the Supreme Court of Louisiana at least to the extent that no cases have been reversed in the supreme court because of the use of the blackboard, which is quite widespread in all personal injury litigation. One trial judge consistently refuses to permit audiovisual demonstrations to be made in his court, while another has permitted it on rare occasions. In one case the trial court, over objection, allowed the use of a tape-recording machine to reproduce noises made by a manufacturing plant in an injunction action.

2. Although most of the lawsuits for personal injuries that are tried in the state courts in Louisiana are tried before the court alone without a jury, it is permissable to reveal the amount of the demand to the jury. In the United States District Court the attorney has been allowed to read the pleadings to the jury in some instances, and in other instances the district judge has not allowed it.

In those cases where the demand of the plaintiff exceeds the policy limit in suits in the United States District Court, the court will grant a motion to strike the demand in excess of the policy limit unless the suit is against both the insurance company and the named insured.

3. There appears to be no statutory law or appellate decisions directly bearing on the above subjects. Apparently the matters are governed by the discretion of the trial judge.

MAINE

1. The Maine Supreme Court does not appear to have passed upon the specific circumstances set out in the *Botta* case or circumstances comparable to those found therein. Apparently, graphic aids or mathematical formula in general are permissible, or at worse a harmless impropriety provided they are used merely to illuminate a point of argument that is being made and provided they are not used in such a way as to confuse the jury into considering them as evidence.

2. Apparently, the Maine Supreme Court has not passed upon the question of whether or not it is permissible in personal injury cases to reveal to the jurors the amount sued for.

3. In Maine, these matters are governed only by court rules and decisions and primarily left mainly to the discretion of the trial court. In fact, the discretionary authority of the presiding trial justice to control argument was firmly established in *Young v. Carrigan* (1957) 152 Maine 332, 129 A. 2d 216.

MARYLAND

1. There are no appellate decisions concerning the blackboard treatment by plaintiff's counsel of the value of pain and suffering and permanent disability. Although there is some confusion and difference of opinion among the trial judges in Maryland, generally they do not permit anything except actual expenses proved or stipulated, to be written on the blackboard.

2. In Maryland the jury may take with it to the jury room the entire pleadings, which includes the *ad damnum*.

3. The authority stating that the blackboard treatment is entirely within the discretion of the trial court judge arises from trial court decisions. The authority which permits the pleadings, including the *ad damnum* to be shown to the jury is from cases of the Supreme Court of Maryland.

MASSACHUSETTS

1. In *Gardner v. State Taxi*, 336 Mass. 28, 142 N.E. 2d 586, the Supreme Judicial Court of Massachusetts, Suffolk, in reviewing a case where blackboard tactics were used to give the jury an estimate of the monetary value of the plaintiff's injuries, took "a dim view" of such tactics although it did not state definitely that in a case where the evidence was sufficient to warrant the same they could not be used. The court merely based its condemnation of the method upon the fact that the computation was not in accord with the evidence.

In the same case, counsel for the plaintiff in his argument to the jury asked for $200.00 per week for total disability, multiplied by six months, and for $100.00 per week for partial disability for one month. Defendant's exceptions were overruled and the appellate court held they should have been sustained, holding that counsel for plaintiff went far beyond the permissible limits. "There was nothing in the evidence that would justify the finding of a total disability of 6 months or a partial disability of 1 month." It would seem that the ruling was based on lack of evidence, rather than improper procedure.

2. The state of Massachusetts will permit the *ad damnum* of the complaint, or writ as it is called in Massachusetts, to be revealed to the jury. (See *Kinnear v. General Mills,* 308 Mass. 344, 32 N.E. 2d 263.) It is also within the power of the trial judge to grant a motion to increase the *ad damnum.*

3. There are no statutory provisions or rules of court applicable to either questions 1 or 2.

MICHIGAN

1. There is no decision of the Supreme Court of Michigan on the so-called "full blackboard treatment". There are some cases holding that it is improper for plaintiff's counsel to ask the jury to compare themselves with the injured plaintiff; in other words, to argue "how much would you take to go through this pain or suffering", or "how much would you want your mother or sister to have under like circumstances". However, these cases do not seem to touch upon the specific questions decided in *Botta v. Brunner.*

2. Although there are no specific decisions by the Michigan Supreme Court, it seems to be permissible in personal injury cases to reveal to the jurors the amount sued for. In fact, the amount claimed by the plaintiff is frequently set out in the instructions of the trial court. However, in *Spelker v. Knobloch,* (1958), 354 Mich 276, 93 N.W. 2d 276, the court refused to permit a *voir dire* questioning the amount of the *ad damnum* and inquiring whether the jurors felt that was "just too much money, no matter what the proofs show so far as damages are concerned."

3. There are no statutory regulations or rules of court governing these matters. Presumably, they would be determined by decision of the supreme court when presented to it in a proper case.

MINNESOTA

1. In *Bontang v. Twin City Bus Company,* 80 N. W. 2d 30, the Minnesota Supreme Court has permitted the full use of the blackboard as a visual aid in argument of counsel to the court and jury. However, the case holds that material placed upon the blackboard is not to be considered evidence but is merely a visual aid for use in argument. The use of mathematical formulae for illustrative purposes is permitted in the blackboard technique as part of the argument of counsel. It usually has been removed from the board by the time the judge charges the jury.

2. In Minnesota there is no prohibition as to revealing to the jurors the amount sued for and it becomes a part of the record when included in the opening statements. Trial courts permit this as a matter of course.

3. There are no Minnesota statutes dealing with these questions but the procedure has evolved as a combination of supreme court and trial court rulings with a liberal result. Primarily, these matters are in the discretion of the trial court.

MISSISSIPPI

1. The Mississippi Supreme Court has given full sanction to the use of the blackboard. See: *Four-County Electric Power Association v. Clardy,* 73 So. 2d 144, a leading case. For subsequent decisions see: *Nehi Bottling Company of Ellisville v. Jefferson,* 84 So. 2d 684; *Brown-Miller Company v. Howell,* 79 So. 2d 818; and *Arnold v. Ellis,* 97 So. 2d 744. Up to the present time, efforts made to get the supreme court to restrict this rule have only resulted in its expanding the rule.

2. It is permissible in Mississippi courts to reveal to the jurors the amount sued for in personal injury cases.

3. All of these matters are governed by court decisions rather than statute or court rule. Revealing to the jurors the amount sued for is a matter of common practice which does not appear to have been challenged in the appellate courts.

MISSOURI

1. In Missouri, the use of the blackboard by counsel in his argument is generally discretionary with the trial court. In *Boese v. Love,* (1957) —Mo—, 300 S.W. 2d 453, 461, the Missouri Supreme Court said:

> "It would seem the use in argument by counsel of graphic aids such as charts or diagrams or plats which have not been put in use in evidence is permissible, provided they are used merely to illustrate or elucidate a point in counsel's argument based on the evidence, and provided they are not used in such a manner as to tend to confuse or mislead the jury into considering them as evidence."

The committee is informed that as a matter of practice it is within the discretion of the trial court to allow plaintiff's counsel to estimate the value of pain and suffering at so much per minute, per hour, or per day.

2. As a matter of practice, it appears that in Missouri the trial court generally allows the jury to know the amount demanded by the plaintiffs in their Complaint. However, in *Bales v. Kansas City Public Service Company,* 328 Mo 171, 40 S.W. 2d 665, the Missouri Supreme Court held that an instruction which informs the jury they cannot allow damages in excess of the amount sued for, and named in the instruction, is improper.

3. With the exceptions above noted, these matters appear to be largely within the discretion of the trial court. There appears to be no statute or court rule applicable.

MONTANA

1. With respect to the blackboard treatment, the Supreme Court of Montana has not passed upon its use or disuse.

2. With respect to informing a jury as to the amount sued for, it is the practice in the trial courts in many instances to read the pleadings to the jury as opening statements and, of course, this practice reveals the amount sued for. Also, in giving instructions to the jury on damages, it is customary for the court to limit the amount of damages to the maximum amount sued for.

3. It appears that there are no statutes or court rules governing these matters and that at the present time they rest within the discretion of the trial court.

NEBRASKA

1. The Nebraska Supreme Court has not handed down an opinion dealing directly with the question as to the use of a blackboard for any purpose. It has not passed on the propriety of the "dollar amount" argument or the use of a blackboard in its presentation. Such argument with or without a blackboard is not uncommon in Nebraska trial courts, and apparently it would be held to be legitimate if it were reflective only of the pleader's valuation for consideration by the jury in arriving at its own evaluation.

2. No decision of the Nebraska Supreme Court indicates that error arises from the disclosure of the amount of the prayer by argument or reference to the pleadings. However, in *Holly v. Omaha & C.B. St. Ry. Co.* (1923), 110 Neb. 541, 193 N.W. 710, the court said:

> "Defendant further contends that there was error in stating, in an instruction defining the issues, the amount for which plaintiff sued. This has been the general practice in the district courts of the state for many years. We think it is not to be commended, and is often unwise, but in this case we do not think it authorizes a reversal."

3. No Nebraska statute governs these matters and apparently the law lies in the decisions of the appellate courts and is primarily within the discretion of the trial court.

NEVADA

1. There appears to be no present Nevada Supreme Court ruling on the subject of the "blackboard treatment." However, we are informed there is now pending in the supreme court an appeal from a ruling of a district court which permitted counsel for plaintiff to go into the "blackboard treatment" and in which plaintiff's counsel argued to the jury such counsel's views regarding plaintiff's sufferings for specified periods in relation to the amount of monetary damages. In the past the "blackboard treatment" has been permitted in the trial courts of Nevada.

2. Under existing Nevada practice it is permissible in personal injury cases to reveal to the jurors the amount sued for in the way of damages. The pleadings in the case are viewed as being available to the jury and attorneys may refer to them. In instances where excessive damages have been sought defense counsel has brought before the jury the amount prayed for as damages by plaintiff's counsel to show the exaggerated amount sought, considering the evidence of injuries and damage adduced at the trial.

3. There appear to be no statutes, court rules or appellate decisions which govern these matters. It appears to be a matter of custom and practice, subject to the discretion of the trial court.

NEW HAMPSHIRE

1. It does not appear that the specific circumstances set out in the *Botta* case or circumstances comparable to those found therein have ever been before the Supreme Court of New Hampshire. Apparently, New Hampshire would say that graphic aids or mathematical formulas in general are permissible, or at worse a harmless impropriety provided they are used merely to illuminate a point of argument that is being made and provided they are not used in such a way as to confuse the jury into considering them as evidence.

2. *In Williams v. Williams* (1935), 87 N. H. 430, 182 A. 172, the court said that a reference to the *ad damnum* clause in the Writ or Complaint is not improper. See also *Sanders v. Boston* & M.R.R., 77 N.H. 381, 92 Atl. 546.

3. In New Hampshire, these matters are governed only by court rules and decisions and apparently are generally left to the discretion of the trial court.

NEW JERSEY

1. & 2. The recent Supreme Court case of *Botta v. Brunner,* 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331 (1958), sets forth the answers to both of these questions. Counsel for the plaintiff may not suggest the amount of damages to the jury in a personal injury action; the jury is not permitted to see the Complaint which sets forth the amount of damages the plaintiff is requesting. It should be noted that in this opinion, the Supreme Court of New Jersey relies on decisions of the Pennsylvania Supreme Court.

Since the *Botta* case was handed down, two later cases have followed that decision. To permit plaintiff's counsel to suggest to the jury the amount of a verdict is not an automatic basis for reversal, but as in cases of trial error generally, will justify reversal only if found materially prejudicial in the particular case: *Johnson v. Stoveken,* 52 N.J. Super. 460, 145 A. 2d 801 (1958); however, in absence of an affirmative showing by the plaintiff's counsel that his remarks did not materially prejudice the defendant's case, it can be assumed that plaintiff's attorney's improper remarks have accomplished their purpose; *Purpura v. Public Service Electric and Gas Company,* 147 A. 2d 591 (1959).

3. The above matters are governed by decisions of the Supreme Court of New Jersey.

NEW MEXICO

1. The "full blackboard treatment" has neither been condoned or condemned by the New Mexico Supreme Court. The question of demonstrative evidence is generally in the discretion of the trial court. The per diem or dollar treatment has been used in the trial courts but its propriety has never been decided by the supreme court. However, in at least two wrongful death actions the supreme court has discussed the question of annuities and broken the verdict down into a per month basis in order to determine the excessiveness of the damages.

2. The supreme court has not spoken on whether it is permissible in personal injury cases to reveal to the jurors the amount sued for, but all attorneys engaged in personal injury litigation do reveal it in their statement of the case and it has never been challenged by the defense.

3. The above matters are not covered by statute or court rules, and apparently not by any appellate court decisions.

NEW YORK

1. In New York, counsel are allowed to use the blackboard in personal injury cases as an aid to argument. However, New York appears to follow the Pennsylvania and New Jersey rule and does not allow plaintiff's counsel to give his opinion

of the amount of damages for pain and suffering based on a mathematical calculation of so many dollars per minute, per hour, or per day.

2. The jury is permitted to know the amount demanded by the plaintiffs as set forth in the Complaint.

3. Apparently, these matters are governed by appellate decision and by trial court discretion.

NORTH CAROLINA

1. The court of last resort in North Carolina has not considered or passed upon the use of the blackboard "treatment" in tort actions. As a matter of practice, its full use is permitted by some trial judges and its restricted use permitted by others.

2. In North Carolina, the amount sued for in personal injury cases is revealed to the jury in the pleadings that are intially filed by the plaintiff.

3. The matter of revealing the amount sued for to the jury appears to be controlled by statute in North Carolina, while the matter of the blackboard use apparently rests within the discretion of the trial court, at least until there has been some appellate court decision on this matter.

NORTH DAKOTA

1. There is no opinion of the North Dakota Supreme Court dealing directly with the question of the use of a blackboard for any purpose. With respect to the calculation of the value of pain and suffering, the North Dakota Supreme Court said in *Lake v. Neubauer,* (1958), —N.D. —, 87 N.W. 2d 888:

> "The determination of damages for pain and suffering is not susceptible of arithmetical calculation."

The foregoing language of the North Dakota court, although to some extent indicative of its attitude, scarcely justifies an assumption that it would more than disapprove, if that, of an argument presenting the "dollar amounts per minute, etc." as the value of pain and suffering.

2. No decision of the North Dakota Supreme Court has been found to indicate that error arises from the disclosure of the amount of the prayer by argument or reference to the pleadings.

3. No North Dakota statute governs the calculation of damages for pain and suffering, the use of a blackboard, or the disclosure of the amount for which recovery is sought.

OHIO

1. The Supreme Court of Ohio has not as yet passed upon the question of the full blackboard treatment. However, the courts of appeals have repeatedly held that the question of the use of a blackboard in a case is in the discretion of the trial court. In *Miller v. Loy,* 101 0. App. 405, 140 N.E. 2d 38, 1 0.0. 2d 331 (1956), the blackboard was used in support of an argument made by an attorney.

2. The answer to this question in Ohio appears to be "Yes", although there is little direct authority, probably because the practice is so widely accepted that it has not been questioned to a great degree. It is proper for an attorney to read his pleadings as part of his opening statement, which presumably would include the amount sued for. In 16 0. Jur. 2d, Damages, Section 190, the statement is made that the jury may be instructed by the court that they may not return a verdict for a sum larger than that claimed. This indicates that it is proper to disclose to the jury the amount of plaintiff's prayer.

3. There is no express provision in the Ohio statutes or court rules with respect to either question 1 or 2; and the rules of law with respect to these matters and controlled by decision, and perhaps with respect to question 2, it is more or less a matter of accepted practice rather than an express rule of law.

OKLAHOMA

1. The full blackboard treatment has not been sanctioned or disapproved by the court of last resort.

2. It is permissible in personal injury cases to reveal to the jurors the amount sued for. In fact, the court informs the jury as to the amount asked and, in the instructions, directs them to return a verdict not exceeding the amount asked if the jury should find for the plaintiff on the question of liability.

3. Both of these matters are governed by the trial court's discretion. Apparently there are no statutes, court rules, or appellate decisions which control.

OREGON

1. The blackboard method of presentation has not as yet been a subject of discussion or ruling by the Oregon Supreme Court. Up to the present time, the matter has been handled entirely as a discretionary matter for the determination of the particular trial judge. Some Oregon trial judges will not permit such presentations but the majority probably will allow it.

2. With respect to the jury's knowledge of the amount sued for, the pleadings go to the jury along with the exhibits which have been properly submitted in evidence. Hence, the amount prayed for is revealed therein. A statute makes mandatory the submission of such pleadings to the jury.

3. With the exception noted above, there are no statutes in Oregon or court rules which govern these matters. They apparently rest entirely within the discretion of the trial court.

PENNSYLVANIA

1. It has been long established by the Supreme Court of Pennsylvania that counsel may not make *any suggestion* to the jury concerning the amount of damages for personal injuries. See *Joyce v. Smith,* 269 Pa. 439, 112 A. 549 (1921); see also *Quinn v. Philadelphia Rapid Transit Company,* 224 Pa. 162, 73 A. 319 (1909); *Stein v. Meyer,* 150 F. Supp. 365, (United States District Court for the Eastern District of Pennsylvania, 1957). This obviously precludes the use of the blackboard for that purpose.

2. In Pennsylvania the amount sued for cannot be revealed by the attorney or the court. Under a recent amendment to the Pennsylvania Rules of Civil Procedure (effective September 1, 1958), Rule 1004 requires that any pleading demanding relief for unliquidated damages shall, without claiming any specific sum, set forth only whether the amount is in excess of, or not in excess of $5,000. The reason for the $5,000 is to slot the cases in the appropriate local trial courts and the appropriate appellate courts. Present complaints do not set forth any specific figure requesting damages in personal injury cases.

3. The above matters are governed by decisions of the Pennsylvania Supreme Court with the exception noted in paragraph 2, which is governed by Rule 1004 of the Pennsylvania Rules of Civil Procedure.

RHODE ISLAND

1. In Rhode Island, the use of the blackboard in personal injury cases as an aid to counsel's argument rests largely in the discretion of the trial court. The same is true with respect to plaintiff's' counsel arguing the amount of damages for pain and suffering at so many dollars per minute, perhour, per day, or per month, and then arriving by mathematical computation at a total amount. It is believed that most Rhode Island trial judges permit these practices.

2. It is within the discretion of the trial judge to permit the jury to know the amount sued for by the plaintiff but in most courts the jury is allowed to receive this information.

3. There are no statutes or appellate decisions governing these matters.

SOUTH CAROLINA

1. The court of last resort of South Carolina has not considered or passed upon the use of the blackboard "treatment" in tort actions. As a matter of practice, most of the trial court judges permit its use.

2. In South Carolina, the amount sued for in personal injury cases is revealed to the jury in the initial pleadings filed by the plaintiff and the jury is permitted to take the pleadings into the jury room.

3. Since South Carolina is a "common law state", these matters appear to be governed largely by the discretion of the trial court subject to appellate court decisions in the event the matter comes before them.

SOUTH DAKOTA

1. No South Dakota Supreme Court opinion deals directly with the question of the use of a blackboard for any purpose. However, in *Cooper v. Holscher* (1932), 60 S.D. 83, 243 N.W. 739, the court held that reversible error arose from the plaintiff's attorney asking the jury if it would accept $5,000 for injuries of like character to those received by the plaintiff. In discussing this matter, the court said:

> "But counsel must confine himself to the reasonable scope of the evidence and to issues presented by the evidence. The question for the jury in this case is: What is fair reasonable compensation

to plaintiff for the injuries caused by the accident, and not what a member of the jury would be willing to accept to stand out in the road in front of an approaching automobile and take the risk of being instantly killed?"

2. No opinion of the South Dakota Supreme Court has been found to indicate that error arises from the disclosure of the amount of the prayer by argument or reference to the pleadings.

3. No South Dakota statute governs the calculation of damages for pain and suffering, the use of a blackboard, or the disclosure of the amount for which recovery is sought. Apparently, with the exception above noted, this is largely within the discretion of the trial judge.

TENNESSEE

1. There are no appellate decisions concerning the use of the blackboard in Tennessee. However, it has been the custom for many to use various types of charts and diagrams and such a use has been sanctioned by the Tennessee appellate courts. It appears that the blackboard technique has only recently come into vogue in this state. But even now, the "full blackboard treatment" is only rarely employed.

With respect to allowing the paintiff's attorney to argue a mathematical formula to the jury upon which to base the damages for the plaintiff's pain and suffering, there appears to be no appellate case in Tennessee directly ruling upon this problem. However, it is the general rule of Tennessee and amply supportd by the cases that, "the law affords no measure for human suffering and ordinarily this question is left to the jury." It was further stated by the Court of Appeals in 1928 in the case of *Yellow Cab v. Jelps,* 9 Tenn. App. 288, "there is no fixed rule by which damages for personal injuries can be ascertained or mathematically calculated." It is, therefore, possible to conjecture that if the situation which was disapproved in the *Botta* case arose in Tennessee that the appellate courts would probably be inclined to rule somewhat similarly to the New Jersey Court.

2. It is permissible in personal injury suits to tell the jurors the amount that has been sued for. While there is no statute specifically authorizing this, there is a statute that states that the declaration filed by the plaintiff should state the amount for which he is suing. After the jury is sworn, the next step is to advise them what the issues are and this may be done by reading the pleadings to them or simply stating the issues. This ordinarily includes the amount sued for.

3. These matters appear to be governed by a mixture of statutes, custom and court decisions with much discretion left to the trial court.

TEXAS

1. It is not customary and probably would not be permitted by a trial court for a lawyer at the outset of a trial to use a blackboard to make a jury argument and write the names of witnesses, etc. thereon in support of the statement of what the lawyer intended to prove. However, for many years it has been standard practice for both plaintiff and defendant counsel to utilize the blackboard in the trial of all types of cases. Thus, it is permissible for a blackboard to be used to diagram the scene of an accident or to offer visual aid in explanation of witness' admissible testimony. By the same token, lawyers on both sides use the blackboard in final jury argument, including the writing down of figures for claimed damages. See *J. D. Wright & Son Truck Line v. Chandler,* 231 S.W. 2d 786; *Kimball v. Noel,* 228 S.W. 2d 980, and *ABC Storage & Moving Co. v. Herron,* 138 S.W. 2d 211.

2. The court rules provide for the reading of the plaintiff's complaint to the jury at the outset of the trial, which includes the prayer for damages. This is accepted practice which apparently has never been challenged in the appellate court.

3. Question 1 is governed by court decision and Question 2 by court rules. Apparently there are no statutes involved.

UTAH

1. The full blackboard "treatment" has not been passed upon and, therefore, has not been sanctioned by the Supreme Court of Utah. There is no information as to whether such a question has ever been raised on appeal. It is occasionally used by plaintiff's attorneys in the state of Utah but the better informed plaintiff's attorneys do not use it because of their concern about the possibility that it might constitute reversible error.

2. In Utah, it is permissible in personal injury cases to relate to the jurors the amount sued for. The standard procedure is for the court to state the allegations of the plaintiff and of the defendant in the beginning of the instructions to the jury, and the amount prayed for in the complaint is always stated. In the instruction on damages, the jury is instructed that if they should find for the plaintiff and assess damages, they may not assess damages in excess of the amount prayed for in the complaint.

3. There is no statute governing these matters in Utah. The answer to question 2 is governed by court rules.

VERMONT

1. The procedure condemned by the Supreme Court of New Jersey in the *Botta* case does not appear to have been presented to the Supreme Court of Vermont. It is necessary, therfore, to look to certain general legal principles set forth by that court. Apparently the courts of Vermont would say that graphic aids or mathematical formulae in general are permissible, or at worse a harmless impropriety provided they are used merely to illuminate a point of argument that is being made and provided they are not used in such a way as to confuse the jury into considering them as evidence. For example in *Rice v. Press* (1953) 117 Vt. 442, 94 A. 2d 397, 402, it appears that the plaintiff's counselor remarked, "I think the charge is too high". This was found harmless only on the ground that it appeared to the court that counsel was not stating his personal opinion but his opinion from the evidence in the case. It is improper to use language in an argument to a jury that is equivalent to a personal belief. In *Dochaine v. Ray* (1939) 110 Vt. 313, 6 A. 2d 28, counsel said: "Put yourself in the place of this plaintiff and assess damages on that theory". The Vermont court said that the remark was highly improper and a lamentable departure from the rule which requires counsel to confine his argument to the evidence in the case, and to the emphasis properly to be drawn therefrom, and to avoid appealing to the prejudice of the jury.

2. The question of whether or not it is permissible in personal injury cases to reveal to the jurors the amount sued for does not appear to have been passed on by the Supreme Court of Vermont.

3. It appears that in Vermont these questions are governed only by court rules and decisions and are primarily left to the discretion of the trial court.

VIRGINIA.

1. On June 22, 1959, the Supreme Court of Appeals of Virginia held that the use by plaintiff's counsel of a mathematical formula setting forth on a blackboard the claim of pain, suffering, mental anguish, and the percentage of disability suggested by him on a per diem or other fixed basis, was "speculation of counsel unsupported by evidence, amounting to his giving testimony in his summation argument, and that it was improper and constituted error". The case is *Certified T.V. & Appliance Co.* v. *Harrington,* 109 S.E. 2d 126.

2. In Virginia, the amount sued for in personal injury cases is revealed to the jury in the initial pleadings filed by the plaintiff and the jury is permitted to take the pleadings into the jury room.

3. The matter of revealing the amount sued for to the jury appears to be controlled by statute in Virginia, while the use of the blackboard is apparently governed by the discretion of the trial judge.

WASHINGTON

1. In Washington, the use of the blackboard in the trial court has been largely a matter of discretion of the trial judge. Only recently, has any Supreme Court decision of the state of Washington dealt with the use of the blackboard. In *Minch v. Local Union No.* 370, 44 Wash. 2d 15, 265 P. 2d 286, the Washington Supreme Court reviewed several assignments of error which went to the issue of damages. One of these included an assignment of error with respect to the trial court's permitting a blackboard demonstration before the jury to show a theoretical computation of damages or loss of earnings. In this connection, the court said:

> "First, however, with regard to the ruling of the court permitting a blackboard demonstration before the jury to show a theoretical computation of damages or loss of earnings, we do not think it can be said that the demonstra-

tion was error. . . . . The demonstration was based on evidence in the record . . . . The demonstration was allowable in the discretion of the trial court."

It would appear that this case is authority, authorizing the use of the blackboard in computing damages for which there is evidence in the record. However, it can also be inferred that the Washington Supreme Court would not sanction the blackboard's use in computing damages for pain and suffering on which there is no express evidence.

2. With respect to informing the jury of the amount sued for, it is common practice to instruct the jury that they shall award no more than the amount sued for. Some of the older supreme court cases seem to infer that such reference to the amount sued for is not error. A more recent case, however, *Snyder v. General Electric Company*, 47 Wash. 2d 60, 287 P. 2d 108 (1955), indicates a thought that perhaps the supreme court may be responsive to reviewing the older decisions and can perhaps be said to indicate a feeling of the court that such instructions are not proper. In that case the court observed that "the fixing of a maximum in instruction on damages of necessity invites a large verdict by inferentially telling the jury that anything under that amount is permissible".

3. There is no court rule or statute in Washington at the present time relating to the use of the blackboard. Neither is there a statute, court rule, or decision of the supreme court dealing directly with the matter of revealing the amount sued for to the jury to the extent that it can be considered controlling. Thus, these matters rest largely within the discretion of the trial court.

WEST VIRGINIA

1. The court of last resort of West Virginia has not considered or passed upon the use of the blackboard "treatment" in tort actions. In practice, however, some trial judges permit its full use, some its partial use, and some do not permit its use at all in West Virginia.

2. In West Virginia, the amount sued for in personal injury cases is revealed to the jury in the pleadings that are initially filed by the plaintiff and the jury is permitted to take the pleadings into the jury room with them.

3. Since West Virginia is a "common law state", apparently, both of these matters rest largely in the discretion of the trial judge subject to appellate court decisions when the matters are presented to them.

WISCONSIN

1. Although there has been no Wisconsin Supreme Court decision on the question of use of the blackboard, most of the trial courts throughout the state have a blackboard in the court room for the use of counsel, and the United States District Courts in Wisconsin also have blackboards for the use of counsel during the course of their argument to the Court and jury, for illustrative purposes. It has been the accepted practice for counsel, if they desire, to use the blackboard for mathematical computations as to damages and to make diagrams in the course of their argument to illustrate their argument to the jury.

2. It is quite common for personal injury attorneys, in their opening statements or in the course of their final arguments, to tell the jury how much they are suing for and to explain how and why they arrived at that particular figure and how they computed it. It is also quite common for plaintiff's attorneys to attempt to increase the amount of damages by arguing that the plaintiff is entitled to so much a minute or so many dollars a day, week or month for pain and suffering, disability, loss of earnings, etc. However, the usual instruction by the trial judges in Wisconsin includes an instruction to the effect that damages are not capable of mathematical computation, but that the jury is entitled to consider all of the facts and circumstances bearing upon damages as outlined by the court.

3. There appear to be no statutes or rules of court governing these matters and no supreme court decision on the blackboard treatment. The discretion of the individual trial judge seems to be the controlling factor.

WYOMING

1. It is customary practice for the trial courts to allow the use of blackboards for drawings, computations, and argument. The question has never been raised in the appellate court in Wyoming relative to outlawing the blackboard as a means of presenting a personal injury case.

2. With respect to informing the jury of the amounts sued for, it is normally included in the court's instructions to the jury that the verdict cannot exceed the amount prayed for and then the specific amount prayed for is set forth. It is also permissible to mention the amount both in the opening statement and in the closing argument.

3. There appear to be no Wyoming statutes governing the above matters. They are handled by rules of court or common practice rather than by specific decision or statute.

OPEN FORUM

GEORGE I. WHITEHEAD, JR., *Chairman*
New York, New York

GERALD HAYES, JR., *Vice Chairman,*
Milwaukee, Wisconsin

TUESDAY AFTERNOON SESSION
JULY 1, 1959

THE Open Forum Session of the Thirty-Second Annual Convention of the International Association of Insurance Counsel was convened at 2:00 o'clock, p.m., Mr. George I. Whitehead, Jr., presiding.

PRESIDENT BLANCHET: Members of the Association. I would like to call to order the Open Forum Meeting. Your chairman is Mr. George Whitehead. Your vice chairman is Gerry Hayes, Jr. I would like to express, at this time, my deep personal appreciation for all of the work the entire committee has done to present this program to you. I give you Mr. George Whitehead, chairman.

CHAIRMAN GEORGE I. WHITEHEAD, Jr.: Thank you, very much. Mr. President, members of the International Association of Insurance Counsel, ladies and gentlemen: A young man who is highly regarded in the local community as an after dinner speaker was asked to address a local lodge meeting on a subject of his choice, and he chose sex. The speech was very well delivered and the membership of the lodge enjoyed it very much. Well, that evening, when he returned home, his wife asked him how things had gone, and not wanting to become invoved in a detailed explanation, he said, "Fine." He said, "I talked on aviation. The membership seemed to like it very much."

The next day, when his wife was down in the local shopping center, she met some of the members who had been at the meeting the night before, and they told her how much they had enjoyed her husband's talk. She said, "Yes, he told me something about it. I really don't know why he chose the subject, because he knows absolutely nothing about it at all. As a matter of fact, the first time he tried it, it made him dizzy, and the second time, he became quite sick to his stomach."

I don't think there is going to be any confusion today about what we are talking on, because we are going to talk about airplanes and aviation.

Quite recently, I had the occasion and good fortune to be invited to speak to a bar association meeting about aviation negligence cases in general and, as is usually the case, the cocktail hour was very well attended, and while I was milling around out in the bar area, being introduced to the membership, I very pointedly asked somebody, "Are you going to have dinner?" The reply was that they thought they would have dinner, but they weren't going to stay to listen to the speaker, because the firm had never handled any aviation cases and they would only be spinning their wheels if they did stay.

As this tremendously dynamic industry increases, this overheard conversation becomes more and more meaningless. The airplane has been the primary mover of people in interstate transportation. The same is true in air travel on the ocean airlines to the gateway cities throughout the world. The jet aircraft now crossing the country are a giant step forward in transportation. Unhappily, we are not going to eliminate accidents in the foreseeable future, and there is nothing to suggest that liability insurance is going to become unnecessary in the foreseeable future.

You may feel that the airplane is not here to stay. That may be your personal opinion, but I don't believe that anyone in this audience today doesn't have clients who use the airplane extensively in their business for shipping goods, transporting executives and personal pleasure flying. It just seems to me that it is inevitable that

sometime you are going to have a case with an aviation flavor, and we hope that this discussion today may stimulate your interests and thinking about a subject which, up until now, you may have felt was a sphere of interest only for a specialist and expert.

When your Open Forum Committee first began thinking about this particular subject, we felt that it would take maybe five categories to tell the whole story of the investigation activities when a major airplane accident occurs.

Of course, there is the activity of the Civil Aeronautics Board, and particularly the Bureau of Safety of the Civil Aeronautics Board, and other active organizations, such as Flight Safety Foundation and Aviation Crash Injury Research people in that organization. A third activity is that of the airline people, especially those whose principal job is flying safety. A fourth activity is the work of the plaintiff's counsel, those who are representing people who have been injured or the surviving families of those who have been killed in these accidents. Finally, another activity is that of the underwriters who insure the people and the attorneys they retain to handle the claims and litigations that grow out of these accidents.

It is pretty obvious that, in the time that we have available to us, the field had to be cut fairly severely in order to give you something significant. So, we have taken the first two categories, that is, the work of the Civil Aeronautics Board and the work of the Aviation Crash Injury Research. Those of us in the International Association of Insurance Counsel, whose principal occupation is aviation and related matters, hope that maybe you will invite us back again in the future to finish the story. In writing to the chairman of the Civil Aeronautics Board about the availability of a speaker, we pointed out that this was a rather significant challenge to the members of your Open Panel Committee, all of whom are interested in one degree or another in aviation; that for the first time, to our knowledge, the Open Forum program would have an aviation forum. When we asked him to provide somebody from the investigation branch of the Civil Aeronautics Board who, perhaps could tell the mission of the board and discuss some of the practical problems in the field, we knew the man we hoped he would provide for us. We were very pleased when the chairman replied that the board was very happy to cooperate with our Association and would make available for the purpose Mr. Oscar Bakke, the director of the Bureau of Safety.

I have heard Mr. Bakke speak at meetings on the subject of investigation and aviation safety. I have also heard him participate as a member of the panel on Civil Aeronautics Board hearings in the investigation of major airline accidents.

I think that you will share our view that he is a most articulate speaker on the subject of safety in aviation.

Mr. Bakke is a pilot, holding an airline transport rating.

He was born in Bergen, Norway, obtained his early flight training as an aviation cadet in the Army Air Corps training program, from which he graduated in 1942. He remained in the air service until 1946, when he joined the staff of the Civil Aeronautics Board.

He has held a number of positions in the Safety and Regulation Bureaus, and he served as a chairman and vice chairman of the United States delegation to a number of international technical conferences.

It gives me a great deal of pleasure to present to you our distinguished speaker from Washington, D. C., Mr. Oscar Bakke, director, Bureau of Safety, Civil Aeronautics Board. (Applause.)

Accident Investigation-an Avenue to Aviation Safety

OSCAR BAKKE,
Washington, D. C.

WHEN word was received that Daedalus and his son, Icarus, had been engaged in certain flight experimentation, which had proved fatal to Icarus, the Cretan Inspector General of Aeronautical Accidents immediately requested Daedalus to furnish, in triplicate, an Accident Report Form 453 (approved by the Council of Eunuchs of the House of Minos, B. C. 1696). Because he was completely preoccupied drafting a proposed budget for the then coming fiscal year, it was impossible for the Inspector General personally to visit the scene of the accident in the Icarian Sea or to examine any witnesses or to subject any of the materials to detailed laboratory inspection. Accordingly, many centuries later, when a group of archeologists finally located the long sought-after accident files of Crete in the ruins of Cnossus, only a father's report (post marked from Sicily) was found on which to base a judgment of probable cause.

Lacking the results of a truly complete and scientific investigation, experts have since plagued themselves and us with their critical analysis of this tragic occurrence. Did Icarus in fact venture too close to the sun? Was the airworthiness of his flight equipment in fact compromised by the melting of the wax bonding material? The thousands of alternatives which suggest themselves are entirely too numerous to permit our consideration at this time but one fact is crystal clear: poor Icarus was not the last. In fact, whatever his aeronautical failings, he stands in distinction at the head of a long list of flights which, but for a narrow margin of error, would have ended in success.

Especially when one deals in the history of such controversial matters as accident investigation, there is security in antiquity. The tale of Daedalus and Icarus makes fascinating reading, but more important to the aviation specialist is the fact that he may speculate at length upon causal factors and cures without risk of offense. Three and a half millenia serve to insulate the critical student — without necessarily dampening his enthusiasm to know the true cause of Icarus' downfall and without necessarily preventing a valuable lesson from being learned or, perhaps, relearned.

In many important respects, the present day bears a resemblance to the post war period when civil aviation tapped the military services for knowledge in dealing with new operating problems, awaited delivery of new aircraft types, stretched plans and programs to breathtaking lengths and exulted in the promise of almost limitless markets. I believe it would be useful to turn our focus to this more recent antiquity — just over a decade ago — and ask ourselves whether lessons were learned then as a result of our common investigative effort and whether these suggest similar promise for today. Not only would such a study avoid the pitfalls lying in the path of current investigations, but there the avenues to aviation safety have been travelled over a longer period of time and are, therefore, far more clearly defined.

The earliest of the Constellation series aircraft were produced during the war and were, therefore, initially delivered to the U.S.A.A.F. In the military service the Constellation saw approximately a year's service test which proved to be especially useful in preparing the way for the introduction of the Model 049 into civil transport service. The early defects causing induction system fires, which plagued the AAF for a time, had been corrected by 1945. Or so it appeared until still another burning engine fell from an AAF Constellation at Topeka. Notwithstanding the mystery that surrounded the Topeka accident, civil operators were confident that the considerable attention given fire protection in this aircraft type was effective insurance against trouble.

On June 18, 1946, a Pan American Airways 049 aircraft was flying over Connecticut enroute to London, England, when fire

broke out in No. 4 engine. Again the engine burned free from the aircraft but the fire continued to burn in the wing until shortly before an emergency, wheels-up landing was made at Willimantic. The investigation disclosed that a bearing supporting the supercharger drive shaft had burned in flight because of deficient lubrication. Failure of the bearing permitted the shaft to vibrate loosely until the universal joint beat against the metal housing. Ultimately, the joint tore its way entirely through the housing, generating considerable heat and distributing a shower of sparks throughout the accessory section. Immediately adjacent to the supercharger drive shaft a high pressure hydraulic fluid line was located. When the vibrating drive shaft came in contact with the end fitting of this line, the seal was broken releasing a fine spray at a pressure of approximately 2000 lbs. per square inch, and thus producing an uncontrollable fire.

The seriousness of this fire was clearly indicated in the subsequent examination of the aircraft which revealed extensive damage to the structure including a large crack through the main spar into the integral fuel tank. A flashlight beam played through the crack revealed the gasoline level in the tank only inches below. A catastrophic accident was clearly averted by the slimmest of margins.

Since the cause of this accident was discovered, an intensive search was again initiated for unrecovered parts of the AAF Constellation which had earlier experienced an engine fire at Topeka. This search eventually produced the supercharger drive shaft which was found to be in substantially the same condition as that in the Willimantic case indicating clearly that the cause of this fire had also been a bearing failure due to oil starvation. This discovery led to the development of a "fix" and never since has the industry been plagued with such an accident. Our minds were again at rest, at least so for as Constellation engine fires were concerned. Surely now these were things of the past.

Our rest was soon to be disturbed, for less than a month later at Reading, Pennsylvania, still another Constellation aircraft was involved in an in-flight emergency which required the pilot to make a wheels-up emergency landing in a field a short distance from the Reading Airport. Witnesses had described flames and smoke streaming from the No. 3 engine and the entire aviation community was shocked again at the thought that still another engine fire had occurred. Since the supercharger drive shaft had been disengaged in the aircraft, this component could not have been involved. However, early in the investigation many were dismayed at the prospects of finding still another defect which had produced a powerplant fire.

Here a parenthesis is in order. The press is often very impatient with the accident investigator, and perhaps properly so. Although the reporter's responsibility to the public to release news while it is still new is cleary and properly established, the investigator cannot deprive himself of some of his most important allies in his search for the cause of an accident – flexibility and objectivity. The press would often have us speculate early in the investigation concerning the cause of an accident; however, the public interest would not be well served by any tendency toward justification or rationalization of an early guess made public. The investigator must be free to pick up a thread, run it down vigorously, and then discard it when it is no longer useful to pursue it further. And at Reading there soon proved to be many such threads.

Other witnesses were located who cast doubt on the suggested origin of smoke and fire in the No. 3 engine. Some believed it had come from the fuselage. Others stated that smoke was seen trailing from the left side of the aircraft as well. The charred remains of the fuselage, which had claimed the lives of all of the occupants but one, did not offer up its secrets willingly. As was our custom, many specialist groups were formed to investigate all facets conceivably involved – powerplant, structure, systems, components and operations. For instance, the electrical systems group gathered about the wreckage and pondered as to the best technique by which to inspect the miles of electrical wiring much of which was consumed by fire or lay deeply buried in aluminum which had melted and puddled in large masses within the wreckage area. To assist in solving problems such as this, it was decided that another aircraft should be brought to Reading to serve as a guinea pig. The electrical systems team would agree upon a particular portion of the system to be explored on a given day. Prior to the search through the wreckage the team would review the system in the guinea pig airplane, pinpointing the loca-

tion of electrical components and the routing of leads in order more easily to identify the corresponding components in the wreckage.

Early in this process the team inspected the generator leads running from the engine Nos. 3 and 4 through the leading edge of the wing and into the fuselage from the wing root. Some of the party entered the belly of the airplane inspecting the through-studs which permitted the electrical power to be brought through the fuselage of this pressurized aircraft without destroying the pressure seal. These through-studs were covered with a plastic substance known as Irvolite. This substance, it was discovered in the guinea pig aircraft, was charred and discolored as though it had been subjected to considerable heat. Immediately, the through-studs were dismantled to determine the cause for this condition. The evidence was clear: a crudely deficient through-stud design had permitted the stud to come into sufficient proximity to the skin to cause arcing from the stud to the skin, pitting and burning both stud and skin. Evidence of severe arcing was found not only on this guinea pig airplane but on a substantial number of other aircraft of the Nation's 049 fleet.

Armed with this clue, the team intensified its search in the wreckage in the vicinity of the left wing root. For many hours the search proved fruitless until finally a member of the team discovered a threaded member protruding slightly from a large mass of aluminum approximately three feet in length, eighteen inches in width and three inches in thickness. Since the dimensions of this threaded component were similar to those of the through-studs, the entire mass was flown to Washington where all of its contents were separated from the aluminum at the National Bureau of Standards laboratories. When this mass yielded its contents, the defective through-studs were discovered. Later another through-stud was found burned entirely in two; clearly this failure had occurred before impact with the ground.

A mockup was immediately arranged of the left wing root area in which identical arrangements were made of the various electrical lines and fluid-carrying tubing. The through-studs were installed in such a way that, by vibrating the mockup, the bolt would slip toward the fuselage and arcing would be produced simulating the condition which was known to exist in the aircraft. Under these circumstances the stud soon burned in two and the stud end on the inside of the aircraft fell free of the fuselage seal, striking a high pressure hydraulic line immediately underneath. Since this happened before the reverse current relay could open, arcing occurred sufficient to puncture the hydraulic line and ignite the resulting spray of hydraulic fluid. Again, an uncontrollable fire was the result.

Not only was the design of the stud and its insulated washers crudely accomplished, but what in retrospect appears to be a surprising lack of imagination had also led to an almost indiscriminate use of materials of different compositions. Both steel and aluminum washers were found; the lugs were of copper and aluminum; the nuts were of brass and steel; the bolts themselves were of brass. This conglomeration of material aggravated the high contact resistance of the studs, increasing the development of high internal temperatures and producing substantially different coefficients of expansion in each of the materials. This loosened the stud and permitted its movement toward the fuselage skin and produced the pitting and arcing previously described.

Again, this investigation produced a fix, and again the industry was insured against repetition of a tragic occurrence. But some lessons are learned slowly. While not directly the cause of this accident, the investigation disclosed that the fiberglass insulated lining in the baggage compartments of the airplane was saturated with combustible hydraulic fluid. A complete resurvey of the aircraft was made and design improvements were accomplished to prevent accumulation of hydraulic fluid in dangerous quantities. Approximately a year later, however, we were dismayed to learn that still another aircraft type had been introducd into air transport service with similarly hazardous conditions of hydraulic fluid accumulation in and around insulating liners.

Booby traps are generally associated with man's destructive genius; they are by no means limited to the military sciences, however. In 1947 there was perfected as insidious and lethal a booby trap as has yet been designed – unwittingly of course but nevertheless tragic in its consequences. As is so frequently the case, this safety problem was not the result of a single design deficiency

nor of a single act of commission or omission. The complete story involves many activities and many people each of whom committed that error which superimposed upon previous errors set the stage for the final tragedy.

The DC6 was introduced into air carrier service in 1947. In October of that year a scheduled transcontinental flight was cruising eastbound at 19,000 ft. in the vicinity of Bryce Canyon, Utah. In accordance with a practice followed by many pilots, the Captain decided to balance the weight of fuel throughout the wings by transferring gasoline from one tank to another; in particular, he opened the crossfeed valve between the No. 4 alternate tank and the No. 3 alternate tank and turned on the boost pump in the No. 4 alternate tank. The fuel, therefore, began to flow from the former to the latter tank. Obviously, it was the pilot's intention to stop the fuel transfer process before the No. 3 alternate tank became full. In this instance, however, he neglected to stop the transfer process, the No. 3 tank did become full and the overflowing fuel found its only escape through the tank vent located just below the leading edge near the left wing fillet. The Civil Air Regulations under which this aircraft was constructed specified that, "It shall not be possible for fuel to flow between tanks in quantity sufficient to cause an over flow . . . ." under circumstances such as confronted this flight. Moreover, the same regulations specified that, "Vents and drainage shall not terminate at points where the discharge of fuel from the vent outlet will constitute a fire hazard . . . ." The No. 3 alternate tank vent location did constitute a fire hazard. The fuel streamed rearward down the wing fillet almost directly toward the cabin heater air intake scoop. This scoop is so designed as to cram a large quantity of air into a minimum frontal area but it obviously could not distinguish gasoline from air. Moments thereafter, the temperature in the cabin lowered sufficently to actuate the cabin heater cycling control. The cabin heater began to pour fuel into the combustion chamber where it was ignited. However, the combined sources of fuel from the heater's own fuel system and from the No. 3 alternate tank vent produced an excessively rich mixture which backfired into the cabin heater air intake duct where the overflowing gasoline continued to burn. The aluminum ducting was not designed to withstand the temperatures of burning gasoline and the flames soon penetrated the walls of the duct gaining access to the hydraulic section in the belly of the airplane. Within seconds thereafter an uncontrollable fire was in process.

This fire actuated the baggage compartment smoke detectors. If some other activity in the cockpit had preoccupied the pilot to the extent that the fuel transfer process had been neglected, certainly a baggage compartment fire warning would not serve to alert his memory. No immediate association could have been apparent to the pilot. Believing he had a baggage compartment fire, he so notified company radio and proceeded toward the Bryce Canyon Airport. Unfortunately, control was lost of the aircraft before a successful landing could be accomplished.

Another parenthetical observation is needed here. In the days that followed, many persons gathered at the scene of the accident because of the widespread interest it aroused—representatives of airframe manufacturers, including the manufacturer of this type aircraft; powerplant and component manufacturers; many air carriers; military organizations; airmen associations and government agencies. By the fourth day, approximately 120 of the most highly skilled engineering and operational specialists in the country were participating in the investigation of this accident. To locate the pieces of structure that fell from the aircraft prior to impact with the ground in order to determine the sequence of failure in flight, the nature of the progression of the fire, and the substances which had caused flame impingement upon these structural members, it was necessary that a large percentage of parts be recovered. The recovery team represented at times more than sixty individuals on foot and on horseback, scouring twenty-nine miles of some of the most remote wilderness of the United States.

The federal government does not staff and equip investigative agencies to provide fully for all the skills and knowledge required for such an accident investigation. Accordingly, the investigation process has become what is, in my judgment, one of the finest examples of government-industry collaboration. Each of the activities is under the direct supervision of Civil Aeronautics Board personnel. Interests are balanced against one

another so that at no time will the investigation be dominated by particular interests and yet, at all times, there is concentrated upon the investigation the best equipped and most skilled individuals available.

The avenue to aviation safety is neither gaily lighted nor smoothly surfaced. Any one who attempts a journey between its major milestones will soon come to appreciate the real effort and, paradoxical though it may seem, the hazards involved. There is much truth in the generalization that the headline is one of safety's worst enemies. Perhaps it would be more precise to say that safety is an objective which can only be achieved by painstaking investigation and careful engineering and, therefore, is not well served by dramatic generalization. It may be that the newspaper man must at times shoot from the hip, so to speak; however, the spot judgment and the hurried, incomplete analysis seldom prove to be the short cut they may sometimes appear to be. Similarly, there is no easy, quick road to the "fix". Very often we have leaned – and sadly – that safety is served best by resisting pressures toward the dramatic solution. The avenue to safety is strewn with many a costly safety "gimmick" whose ultimate effect was worse than the defect it was designed to cure.

No illustration can be perfect. But one example comes to mind in which much careful planning had been accomplished but with some unfortunate exceptions. Driven by in-flight hazards such as those we have previously discussed, the aviation community – government and industry – developed fire and smoke detection systems to alert crews to the earliest indication of fire, and fire extinguishing systems to enable the crew to do something useful about a fire warning. On June 17, 1948, near Mt. Carmel, Pennsylvania, an airliner was cruising in a routine flight, when, without prior indication, cockpit serenity was punctured by a baggage compartment fire warning. The crew immediately notified company radio that the carbon dioxide fire extinguisher had been actuated and that a descent had been initiated. The subsequent radio transmission from the flight became increasingly incoherent as the aircraft descended to the ground in a sweeping spiral striking a steel tower and crashing with fatal consequences to all on board. It was ironic to learn that there had been no fire aboard the aircraft – this had been a false alarm. It was still more ironic to learn that the carbon dioxide, intended as a life saver, had penetrated the cockpit and caused the incapacitation of the crew. But the most bitter note of irony of all was to learn that this accident alone caused three times as many fatalities as had resulted from all the baggage compartment fires in the previous history of aviation.

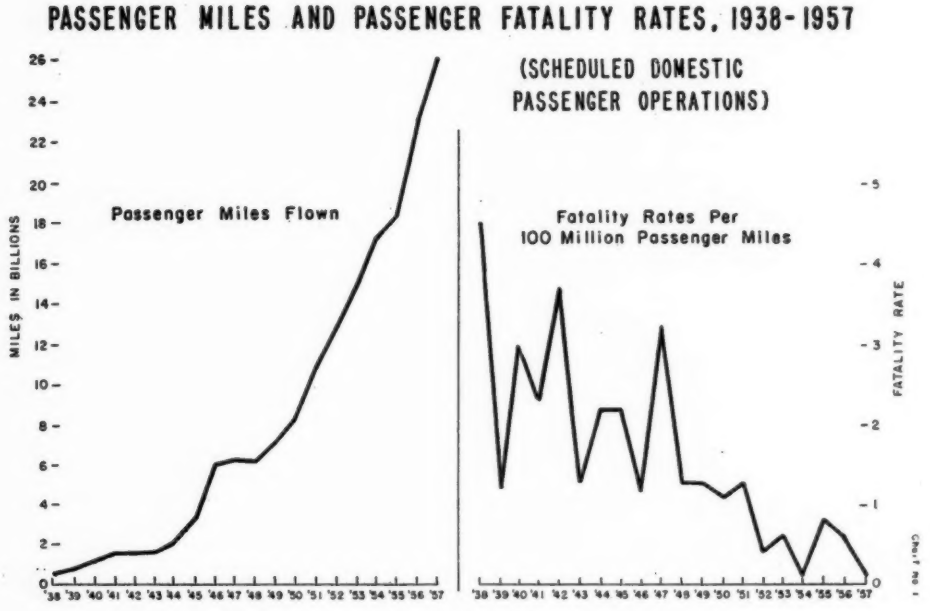
The first accident investigation in which I participated on behalf of the board involved a DC-3 at Cheshire, Connecticut. I recall vividly the description of the fire in the left engine which burned through the spar causing failure of the wing. The wing folded slowly up across the fuselage and the aircraft twisted to the left describing a gentle arc as it plunged 3,000 feet to the ground. But compare this accident with a recent occurrence near Baltimore in which, immediately following an initial structural failure, the aircraft, with almost explosively rapid sequence, tore part after part of the structure loose scattering fragments of wreckage over twelve miles of Maryland countryside. The board was able to conduct a public hearing at Cheshire nine days after the accident. The accident near Baltimore, on the other hand, has already involved the board and parties assisting in the investigation in two months of painstaking piecing of parts together – and our investigation is still not complete.

This important difference is in large part a result of the increase in indicated airspeeds of aircraft since the DC-3. However, speed is not alone different. The DC-3 operated then at a maximum weight a little more than 25,000 lbs; the largest jet transport being delivered to air carriers have a maximum weight of approximately 300,000 lbs. Today's aircraft carry fuel which alone will weight 150,000 lbs. They have many times the footage of cable, wire and tubing and many times the number of electronic, mechanical and hydraulic components. The engineering man hours involved in the development of the DC-8, for instance, will be approximately 35 times that of the DC-3 and the cost approximately 60 times. These are but crude measures but they suggest eloquently that the investigation task of today requires an even more scientific approach than ever before. We trust that flight recorders will assist in meeting this

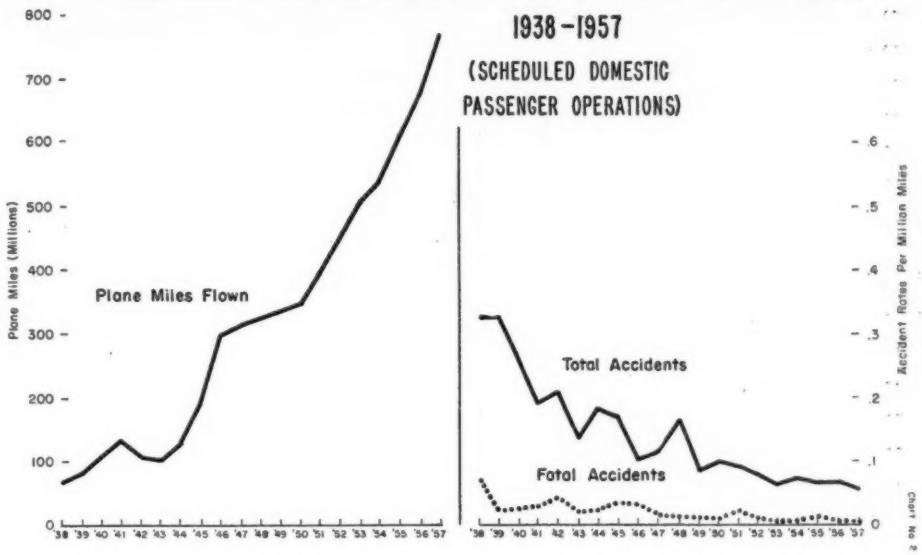
problem. Five valuable parameters are now required to be recorded in high altitude aircraft; namely, airspeed, altitude, gravity, direction and time. Nevertheless, an accident today is very apt to occur at an altitude at which ground witnesses will not be able to furnish important details, to burn far more completely than in the past, to be scattered over a wider area, to include a larger number of critical components, facilities and services, and also to involve a larger investment and far larger number of passengers and, therefore, a more intense public interest.

The airplane accident is a dramatic occurrence. By its very nature, it generates considerable public attention and few events prove effective competitors for the headlines following a major accident. Unfortunately, the same is not true of the correction. Aviation has been completely rid of the causes of accidents such as those at Willimantic, Reading, Bryce Canyon, and Mt. Carmel, but none of the "fixes" were accorded the headlines announcing the accidents themselves. In my opinion the "fix" is the most dramatic part of the story and deserves to be accorded as much attention as the accident. Because it has not, I believe the public has never fully appreciated the remarkable improvement in aviation safety in the last twenty years.

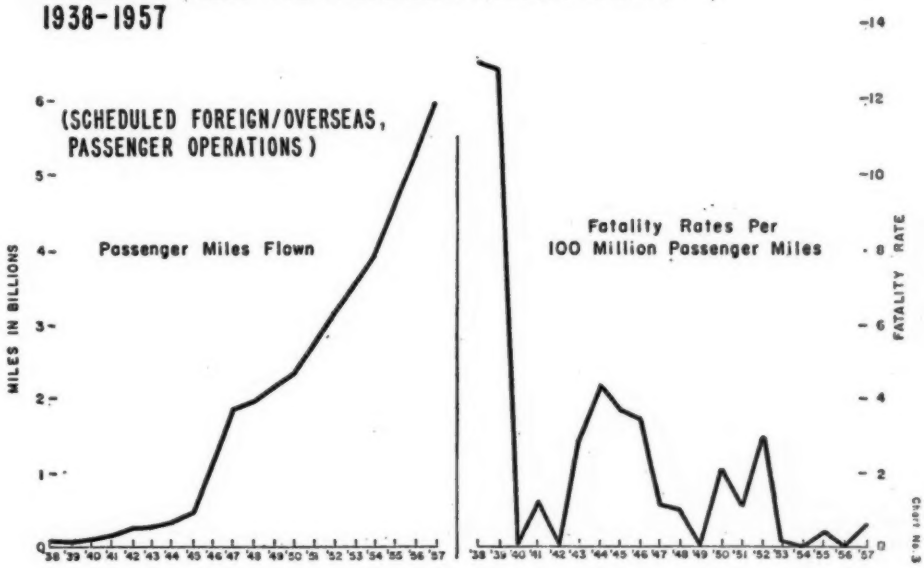
But how to tell this story! Like the hachneyed admonitions we use with our children — don't worry or don't cry — saying so, alone, rarely has the desired effect. A picture of security must be created. I believe, therefore, that I should permit the attached charts to create such a picture. The development of aviation safety during the past 20 years tells a story of consistent improvement and projects a promise of even finer achievements for the future. This promise can be translated into reality if we are genuinely willing to continue to learn from our mistakes. And accidents are the mistakes of aviation.

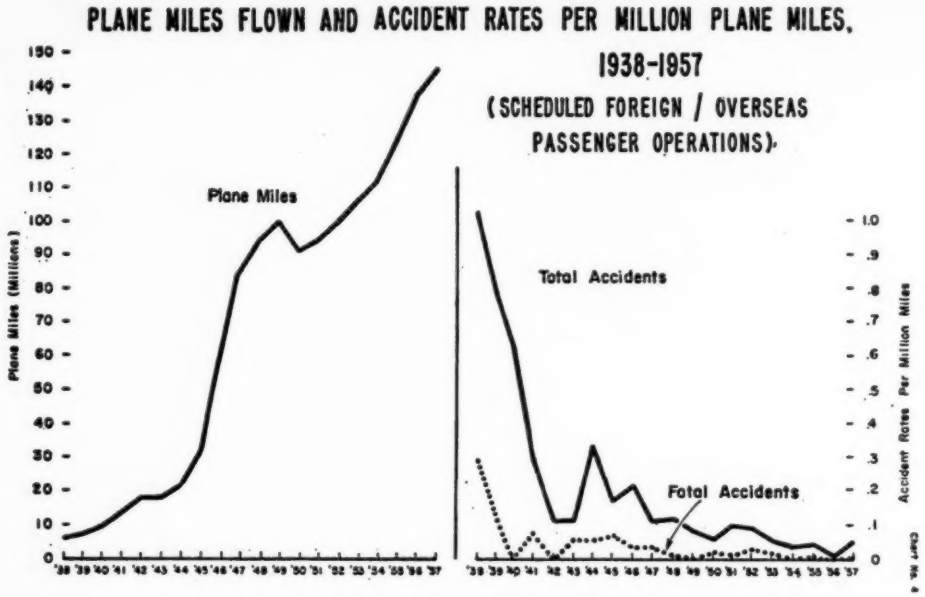


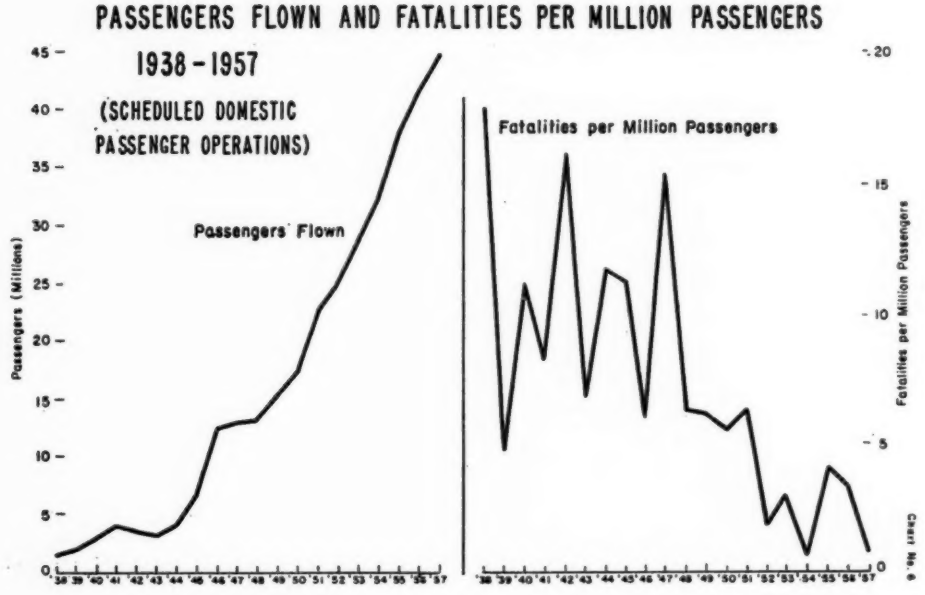
PLANE MILES FLOWN AND ACCIDENT RATES PER MILLION PLANE MILES, 1938-1957



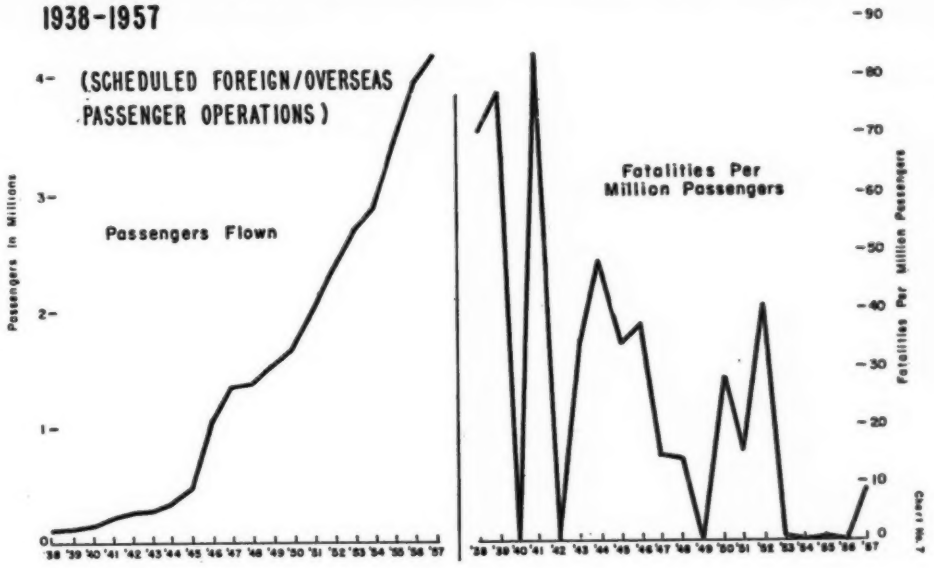
PASSENGER MILES AND PASSENGER FATALITY RATES, 1938-1957



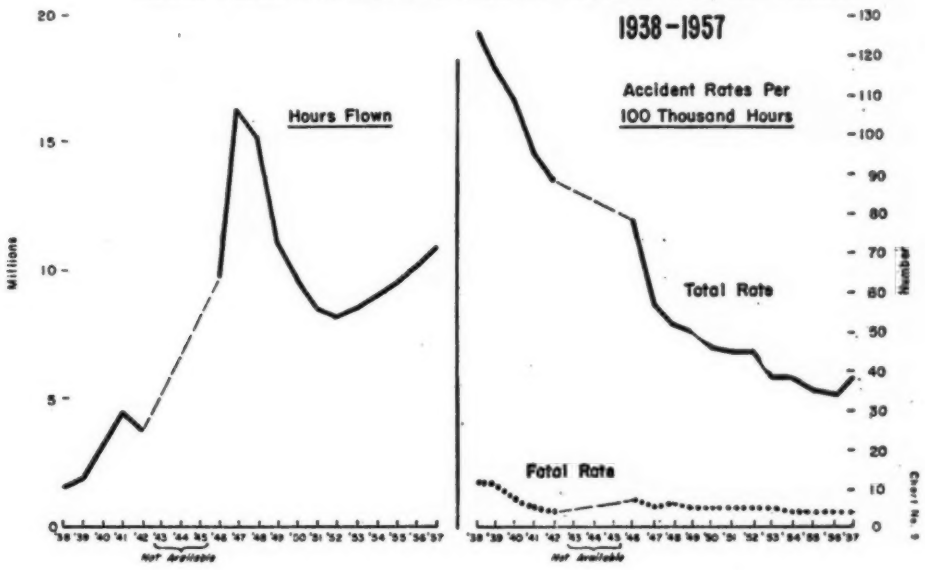

PLANE MILES FLOWN AND ACCIDENT RATES PER MILLION PLANE MILES,
1938-1957
(SCHEDULED FOREIGN / OVERSEAS
PASSENGER OPERATIONS)
Plane Miles
Plane Miles (Millions)
Total Accidents
Fatal Accidents
Accident Rates Per Million Miles
CHART No. 4


PASSENGERS FLOWN AND FATALITIES PER MILLION PASSENGERS
1938 - 1957
(SCHEDULED DOMESTIC
PASSENGER OPERATIONS)
Passengers Flown
Passengers (Millions)
Fatalities per Million Passengers
Fatalities per Million Passengers
CHART No. 5

PASSENGERS FLOWN AND FATALITIES PER MILLION PASSENGERS, 1938-1957



HOURS FLOWN AND ACCIDENT RATES IN GENERAL AVIATION FLYING, 1938-1957



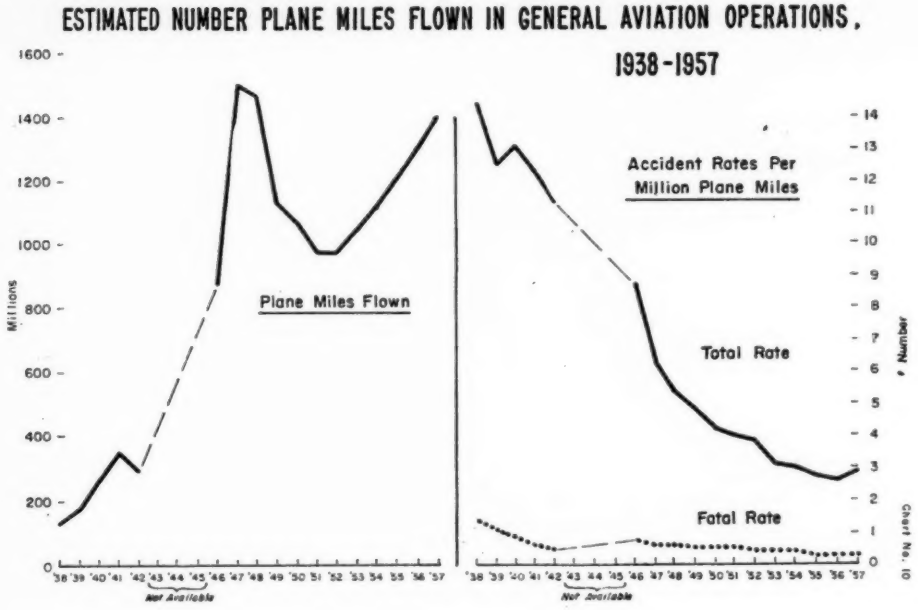


Chart No. 9

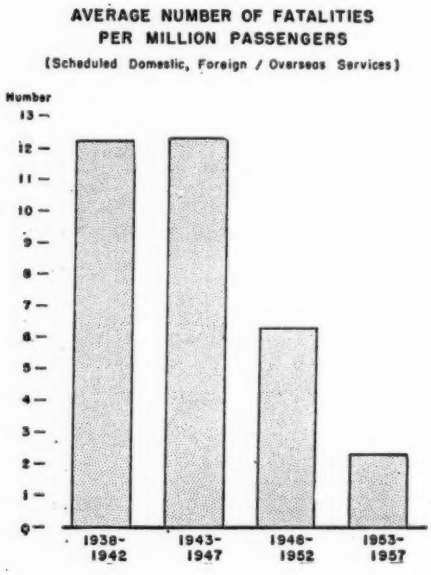


Chart No. 11

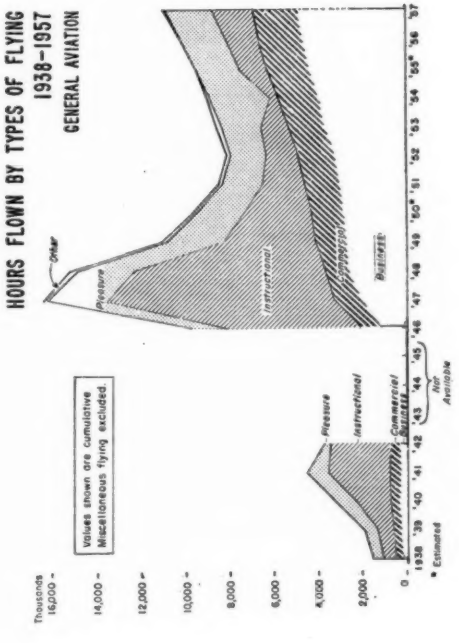


Chart No. 8

COMPARATIVE GROWTH OF DOMESTIC, FOREIGN / OVERSEAS SCHEDULED AIR TRAVEL

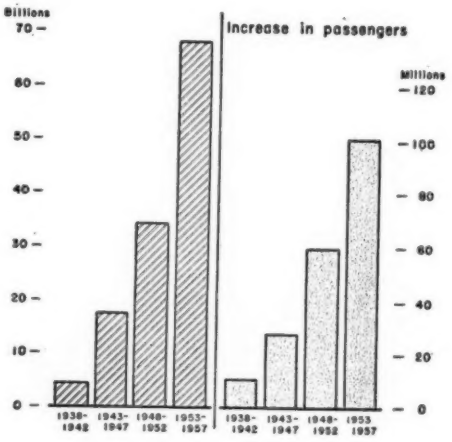
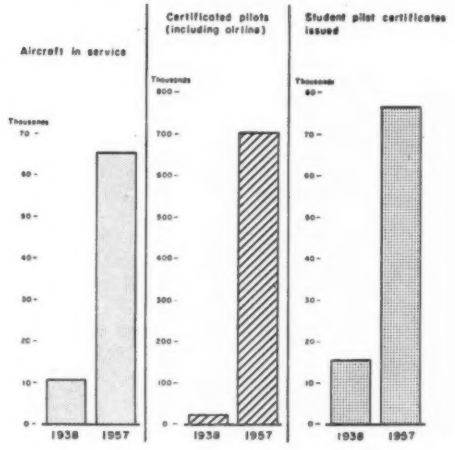


Chart No. 12

AIRCRAFT IN SERVICE, CERTIFICATED PILOTS, STUDENT CERTIFICATES ISSUED- GENERAL AVIATION - 1938 vs. 1957



CHAIRMAN WHITEHEAD: Thank you, very much, Oscar. It was a good many years ago, at least it seems, that an airplane went down in the East River, outside of New York, on an approach to La Guardia Field. Fortunately, there were no fatalities, although there were some superficial injuries and some of the passengers' cases had to be litigated. They salvaged the aircraft, practically intact, but those of you who are familiar with the ocean and the fact that salt water and engines and airplanes do not mix very well, realize that there was quite a problem with respect to corrosion on this salvaged airplane. There was considerable discussion as to what should be done with it. It was even suggested that they might stamp St. Christopher medals out of the aluminum skin, and at least send the first batch to the travelers who escaped what might have been a very serious injury or fatality.

Now, there was one gentleman who wasn't very much confused. He knew what he wanted, but he was asking a number of unusual questions, such as, "Where was each of these passengers sitting?" "Can you let me have all of the medical records?" "I am not a claimant's lawyer, but I woud like to see them, and I would like to know exactly what happened to each of these passengers."

He was interested in the structural integrity of the passenger department and the crew, the flight deck or cockpit. He wanted to know something about the chief forces involved. This man was Mr. A. Howard Hasbrook, at that time, crash injury research, that was working with Cornell, and he was curious and wanted to make this detailed analysis of the crash. Why did these people survive without serious injury a rapid de-acceleration of this sort?

Now, this was my first contact with Howard Hasbrook and the work of the Aviation Crash Injury Research project. The present research injury project is located in Phoenix, Arizona, and its chief mission is to determine means of improving the chances of survivability in passengers and crew in an accident of this sort. It also trains people to be technicians in this rather technical field.

Mr. Hasbrook himself is a pilot. He has some eight thousand hours in flying for twenty-six years. As a matter of fact, his

introduction into this work was, I believe, as I remember the story, it was following a crop dusting accident many years ago, in which he was the pilot, and I have seen some pictures of the airplane involved. It is certainly a miracle that he survived and is with us today to tell us something about this subject.

It gives me a great deal of pleasure to introduce another distinguished guest from Phoenix, Arizona, on aviation crash research injury, A. Howard Hasbrook.

Crash Safety Design Can Affect You

A. Howard Hasbrook
Phoenix, Arizona

BEFORE the initiation of Crash Injury Research, aviation safety efforts were wholly aimed at accident prevention. Through the years, accident prevention programs have been constantly improved, and our decreasing accident rate is proof that the time and money spent in accident prevention has been most worthwhile.

However, despite the magnificent work done in accident prevention, the record also shows that some accidents continue to happen—and may be expected to do so—as long as human beings design, manufacture and operate aircraft.

Although a certain percentage of accidents involve speeds and impact angles which preclude survival in any form, there are a certain number which could permit survival – in many cases with little or no injury – because of the relatively low impact speeds and "flat" angles of impact involved; these are accidents of interest to Aviation Crash Injury Research.

Av-CIR was initiated in 1942 to investigate the possibility that the human body was very strong, in relation to aircraft structure, and that perhaps people were being injured in "survivable" accidents which should have produced no injuries. This concept was triggered by information gained from studying so-called "miraculous" survivals of free falls – people jumping or falling from great heights and surviving with little or no injuries.

Numerous cases of this sort had been studied and it was found that the survivors had resisted loads equal to ten tons in some cases, without severe injury. One case involved a woman who jumped (or fell) from a twelfth story hotel window. She landed in a supine position, crushing a metal ventilating duct located on the top of an adjoining one story building. Her only injury consisted of fractures of two upper arms. She got to her feet unassisted and was attempting to get back into the hotel when witnesses reached her.

Study of this and other falls indicated that survival was due, not to any miracle, but to engineering principles involved; distribute the force of a blow over large areas and the chance of failure of structure—human or inorganic – is lessened. The people who survived these free falls landed on relatively soft structures or terrain, that collapsed (or "gave") distributing the force of the falls over large areas of their bodies.

Another free fall case involved a man who fell from a height of 160 feet – equal to falling from a fifteen or sixteen story building. His deceleration took place in about four one-hundredths of a second; this "quick stop" resulted in a load of almost thirteen tons being imposed on his body. He did not lose consciousness, nor did he have any dangerous fractures. He sustained *no* serious internal injuries.

Thus, it is apparent that the human body is extremely strong. In fact, the human body apparently is stronger than most current aircraft structure.

But, the strength of the human body can be compromised from an engineering point of view, and critically or fatally injured in survivable conditions of crash force, if crash safety design is not utilized.

For example, a person sitting on a chair has a force equal to 1 g (gravity) imposed on his buttocks. If he weighs 160 pounds and if the contact area between his bottom and the chair is equal to 160 square inches, the average pressure he feels on his buttocks is equal to one pound per square inch. This does not cause injury. However, if this person were raised up off the chair (by means of a sling) and an ice pick – point up—were attached to the chair and he were lowered gently back onto the chair, he would be injured; his entire 160 pounds would be concentrated on the very small body area in contact with the ice pick. The pressure applied to the tissue (in contact with the ice pick) would equal several tons or more per square inch. This pressure would exceed the strength and tolerance of the tissue; penetration would take place, and injury would result.

This same situation could easily be made fatal by merely hoisting the person up again and suspending him head downward. Lowering him in this manner, his head

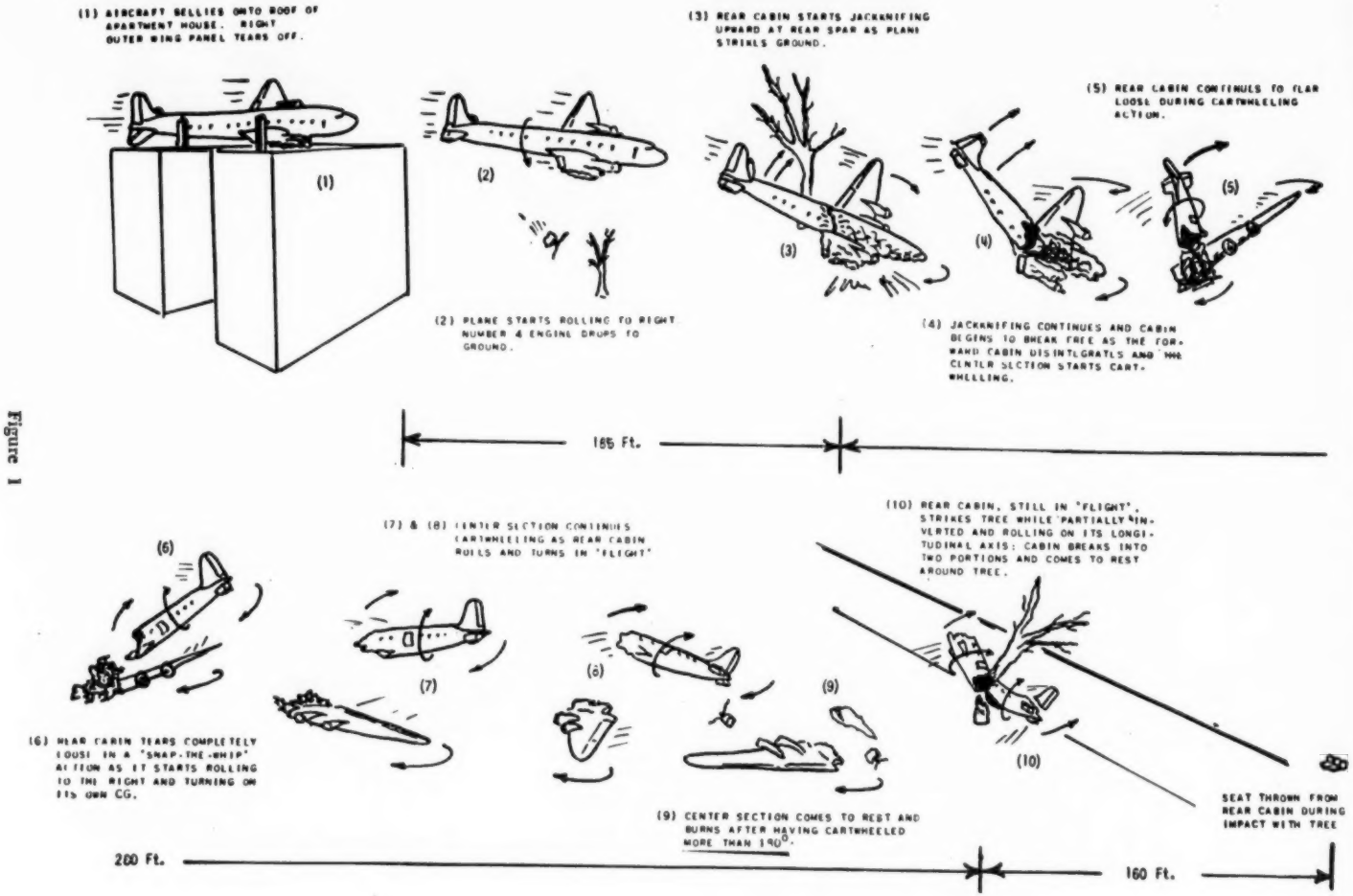

(1) AIRCRAFT BELLIES ONTO ROOF OF APARTMENT HOUSE. RIGHT OUTER WING PANEL TEARS OFF.
(1)
(2)
(2) PLANE STARTS ROLLING TO RIGHT NUMBER 4 ENGINE DROPS TO GROUND.
(3) REAR CABIN STARTS JACKKNIFING UPWARD AT REAR SPAR AS PLANE STRIKES GROUND.
(3)
(4)
(5) REAR CABIN CONTINUES TO CLAW LOOSE DURING CARTWHEELING ACTION.
(5)
(4) JACKKNIFING CONTINUES AND CABIN BEGINS TO BREAK FREE AS THE FORWARD CABIN DISINTEGRATES AND THE CENTER SECTION STARTS CARTWHEELING.
185 Ft.
(6)
(6) REAR CABIN TEARS COMPLETELY LOOSE IN A "SNAP-THE-WHIP" ACTION AS IT STARTS ROLLING TO THE RIGHT AND TURNING ON ITS OWN CG.
(7) & (8) CENTER SECTION CONTINUES CARTWHEELING AS REAR CABIN ROLLS AND TURNS IN "FLIGHT"
(7)
(8)
(9)
(9) CENTER SECTION COMES TO REST AND BURNS AFTER HAVING CARTWHEELED MORE THAN 180°.
(10) REAR CABIN, STILL IN "FLIGHT", STRIKES TREE WHILE PARTIALLY INVERTED AND ROLLING ON ITS LONGITUDINAL AXIS; CABIN BREAKS INTO TWO PORTIONS AND COMES TO REST AROUND TREE.
(10)
SEAT THROWN FROM REAR CABIN DURING IMPACT WITH TREE
200 Ft.
160 Ft.

Figure 1

would contact the point of the ice pick and penetration of the skull would occur; the brain would be lacerated and death, undoubtedly, would follow.

This is a very simple example of how a relatively safe environment (the chair) can be changed into an unsafe—or fatal—environment by "engineering design".

As stated previously, many aircraft accidents are of a non-survivable type; an airplane impacting against the side of a mountain at 500 miles an hour contains so much kinetic energy—dissipated over such a short period of time—that the force generated is beyond the survivable limits of aircraft and human structure.

But, many aircraft accidents involve low speed and relatively "flat" impact angles—landing or take-off conditions. These accidents can produce fatalities and critical injuries among hundreds of people if crash safety design concepts are not used in the design of aircraft cabins and their components, such as the seats. The lack of crash safety design might be called a design deficiency.

To provide useful data for crash safety design, accidents must be meticulously investigated from a crash injury research point of view. In the past, this type of research has provided many useful data. For example, an investigation of a crash in New Jersey showed that the passengers in the rear portion of the cabin rode through *two* accidents; the first, when the aircraft struck the ground, and the second when the rear half of the cabin broke off and "flew" through the air for several hundred feet, striking a large tree sideways. The first impact imposed only moderate, longitudinal forces on the people sitting in the rear of the aircraft. The second impact caused heavy sideward forces to be imposed on the occupants (Figure 1). This reconstruction of the crash kinematics of the aircraft proved helpful in determining the directions of force imposed on the seats, floor structure and on the passengers — as well as providing other important information. It was found that the people who were fatally injured in the rear cabin, for example, died from crushing injuries caused by the tree being forced part way through the cabin. However, despite disintegration of a major portion of the aircraft, 51% of the occupants survived — some with only minor injury.

Figure 2 shows the seat damage and the degree of injury of the various occu-

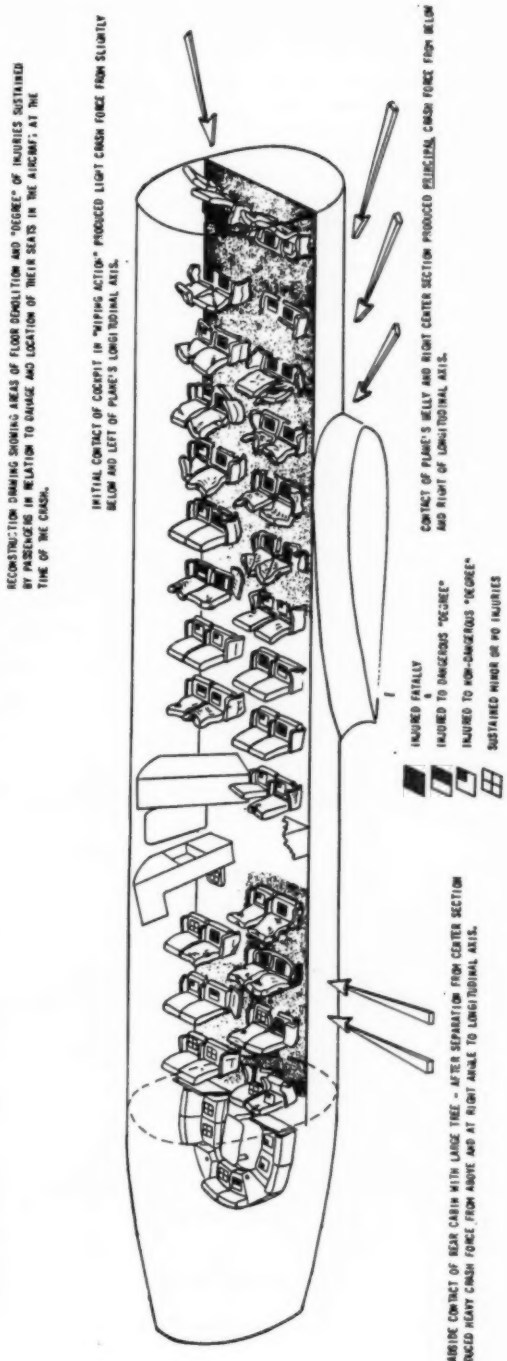


Figure 2

pants. The primary cause of death and serious injury was that of crushing, in areas where the cabin was demolished. To reconstruct such details, Av-CIR has to know where the occupants were sitting; this is why we have to ask the survivors to fill out a rather detailed questionnaire. Without this and related information, it is most difficult to obtain the data necessary for such research – and therby develop a greater degree of survivability in aircraft.

Unfortunately, it has been our experience in many cases to find that the attorneys refuse to permit their clients to give us this needed information, despite the fact that it is de-identified upon receipt-making it of no use in subsequent legal action either for or against the plaintiff.

What do insurance companies and their attorneys face in relation to a jet liner accident, from the point of view of potential financial loss? It would require ten DC-3 accidents to expose the same number of people to injury as might be injured in one jet liner of tourist configuration (Figure 3). This also means that if we are to maintain the same level of exposure, it would be necessary to have only one-tenth the number of jet transport accidents as we might have with the smaller type aircraft. To accomplish this will require even more emphasis on, accident prevention programs (and a great deal is now being done).

Aside from the humanitarian point of view, consideration should be given to the comparative costs of an accident involving a modern jet liner and a DC-3 accident ten to fifteen years ago. First, five to ten times more people will be involved in the jet liner. It is estimated (the author is not conversant with the exact loss figures) that the cost of a DC-3 accident (excluding the cost of the aircraft itself) might be in the vicinity of a quarter million dollars.

However, in relation to today's "market value" of the average passenger, it is estimated that jury awards on behalf of the two hundred passengers might exceed ten million dollars – for one accident, in a jet liner.

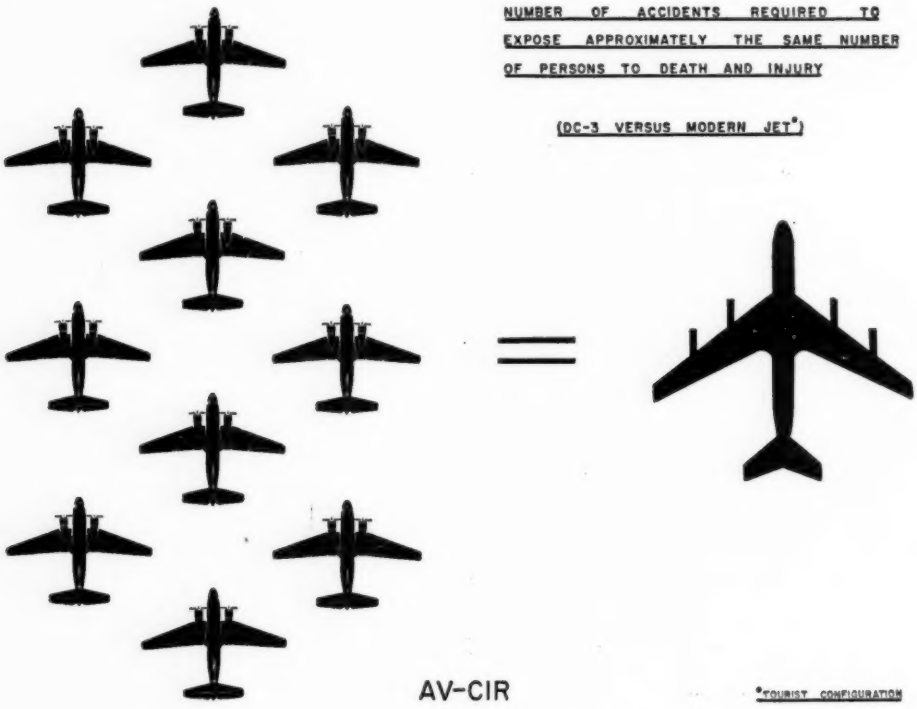


Figure 3

The responsibility for unnecessary injury or death in a survivable accident may not be entirely clear. Naturally, there would be no doubt that the aircraft and its components had been designed and built according to the requirements of the Civil Air Regulations. However, there might be a question as to whether engineering adherence to only the minimum requirements would be sufficient – in relation to the known "state of the art" of crash safety design. There are many experts who feel that the knowledge of ways and means of protecting the human body from injury in survivable accidents has far outdistanced the engineering application of this knowledge – in so far as the Civil Air Regulations are concerned.

The relative strength of the human body and of various aircraft, in relation to the C.A.R. requirements for tie-down strength of seats, safety belts and personnel is shown in Figure 4. The left hand bar indicates the loads – measured in units of g–

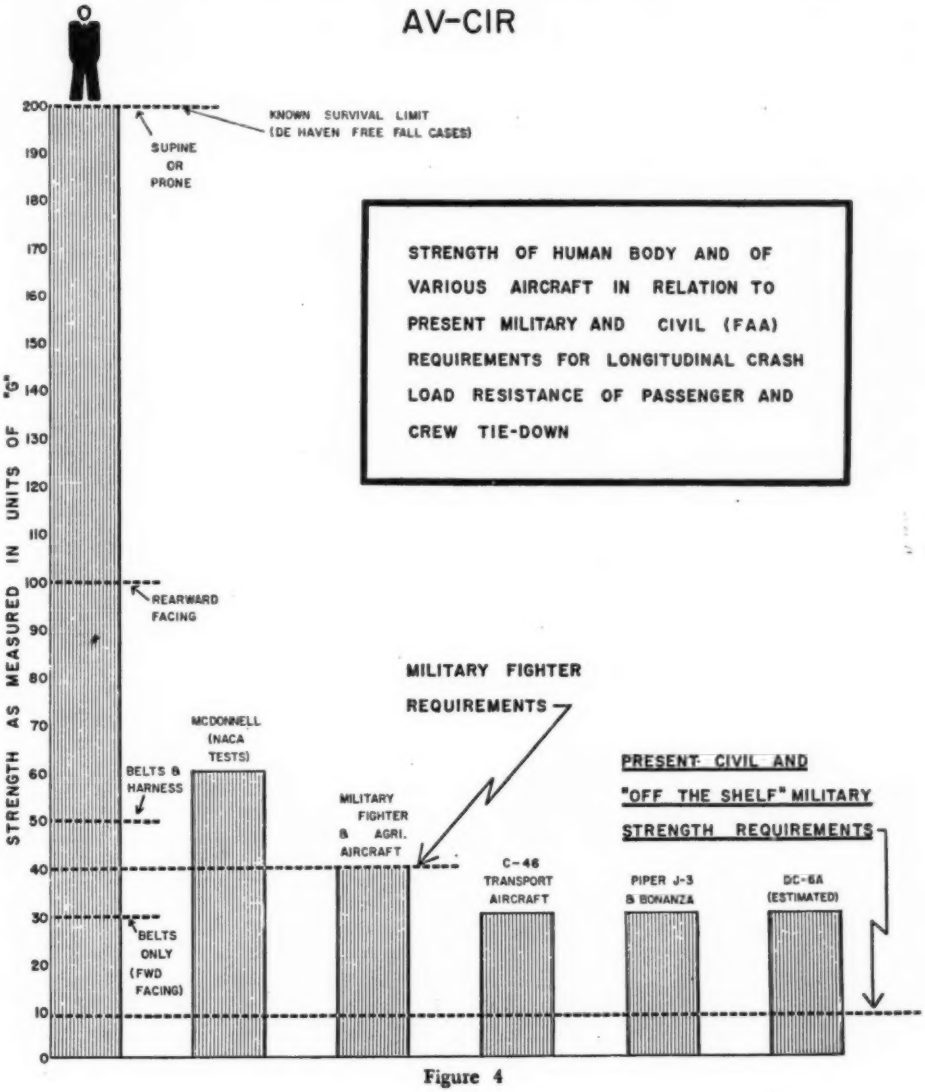


Figure 4

PERCENTAGE OF SURVIVORS SUSTAINING INJURIES TO EACH OF THE 18 BODY AREAS

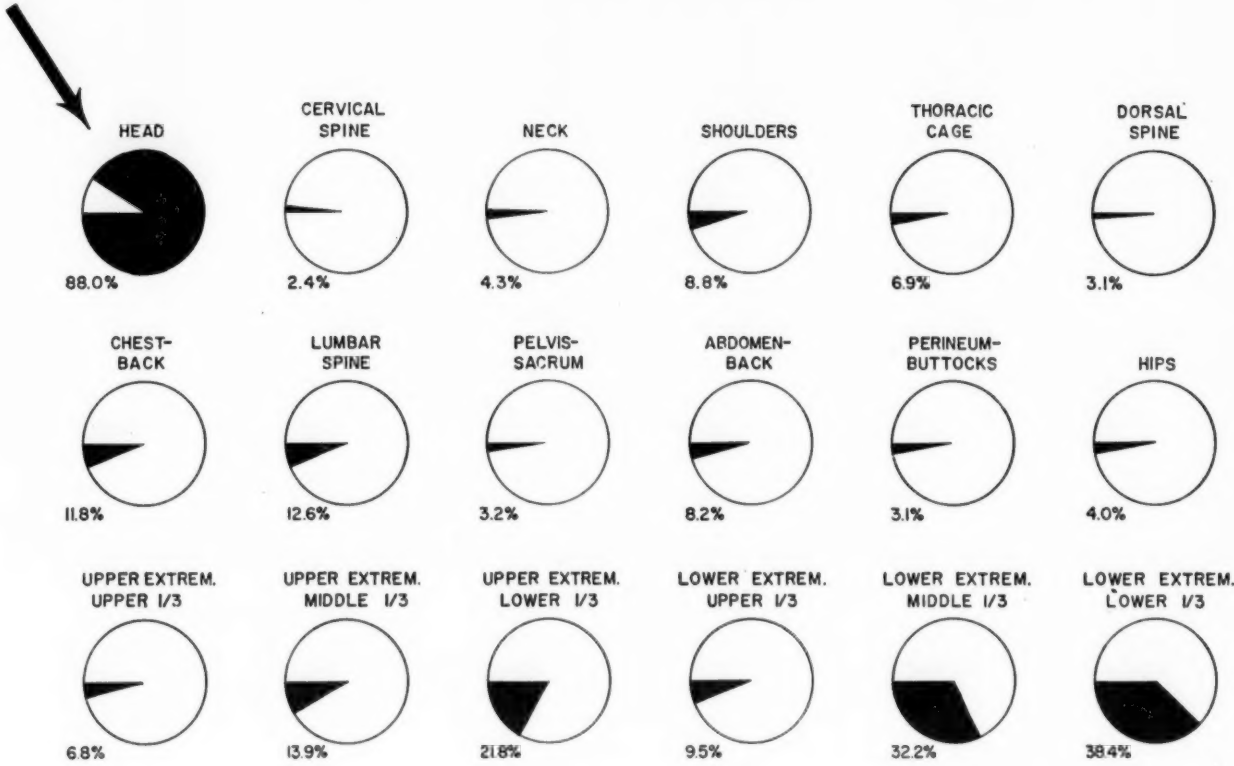


Figure 5

which the human body can survive when the force is applied transversely to the spine and the force is spread uniformly over the body. The second bar (from the left) shows the strength of a jet fighter crash tested several years ago.

The third bar portrays the crash safety strength requirements for military fighters currently in production — 40 g.

The remaining three bars indicate the approximate strength of (a) the Curtiss C—46 transport, (b) a small civil tandem trainer and (c) a current four place executive airplane.

The horizontal line close to, and parallel to, the base of the chart indicates C.A.R. minimum requirements for occupant restraint in civil aircraft. It is obvious that the strength requirements specified to hold an aircraft occupant in place during a crash is far less than the basic strength of these particular aircraft, and much less than the basic strength of the human being.

To increase crash safety, it is necessary to increase the minimum "tiedown" requirements to a point where they are equal to the basic strength of the aircraft itself. In other words, the strength of the floor, seats and safety belts should be equal to the strength of the fuselage.

Crash injury research involves — aside from actual accident investigation — two types of studies. One is statistical in nature; the other is qualitative. Statistical studies assist in defining those areas of design requiring major engineering emphasis, in order to gain the greatest reduction in injury exposure. The result of an Av-CIR statistical investigation of injuries sustained by 800 survivors of lightplane accidents is shown in Figure 5. None of these subjects were wearing shoulder harness during the crashes; their only form of restraint was the safety belt, of the same type used in air transports. The percentage of persons sustaining injury to the head is shown by the upper left hand circle. It is obvious that the head was predominate as an injured area — 88% of the survivors sustained some degree of head injury. Thus, from a statistical point of view, it is evident that the human skull should receive major engineering attention when designing for crash safety.

A prime cause of head injury is impact of the head against rigid objects such as a steel tube in a seat-back (Figure 6). If a passenger's head is hurled against an object such as this (Figure 7) when an airplane skids off the end of a runway and into a ditch, the force on the head can exceed a thousand pounds per square inch. This may result in fracture of the skull, laceration of the brain and, finally, death.

A means of eliminating this type of injury, by providing a seat-back that will "break-over" due to its own inertia is shown in Figure 8.

During an accident the top of the seat-back will move away from the head, so that when contact occurs, the head will strike relatively soft structure — rather than the *rigid,* top edge of the seat-back. In

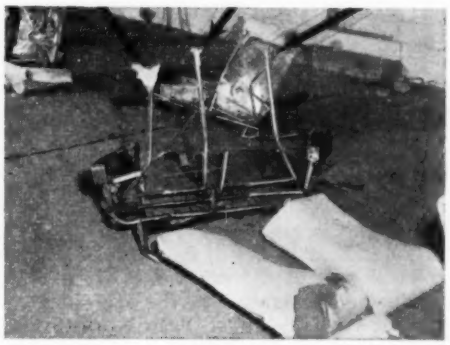


Figure 6

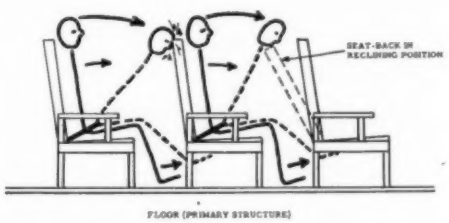


Figure 7

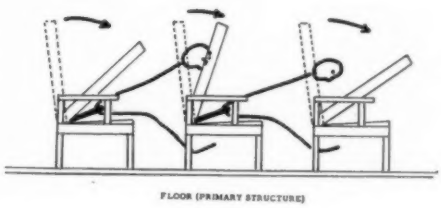


Figure 8

addition, by use of "soft" sheet metal and adequate padding, the seat-back can be delethalized, further reducing the injury potential. Delethalized seat-backs with "break-over" fixtures are used in *some* current transports, but not all; the Civil Air Regulations do *not* require a "break-over" seat-back.

A transport aircraft which crashed, killing 22 of its 38 passengers, is shown in Figure 9. Fifty percent (50%) of the fatalities resulted from head injury. These were caused by head impact against rigid seat-backs. In the analyses of this accident it was found that the pattern of head injury was consistent; the injuries were predominently on the left frontal area of the head (Figure 10). This confirmed other data indicating that the major crash force had been imposed from the side, as well as from the front; the occupants were thrown sideward, as well as forward as they jackknifed over their safety belts—striking the steel tubes at the edge of the seat-backs.

Exposure to injury is drastically increased if the occupants are hurled through the cabin and against bulkheads or wreckage. An interior view of the rear portion of an aircraft cabin is shown in Figure 11. The forward part of the cabin was disintegrated during the crash but the rear half remained virtually intact. Prior to the crash, this portion of the cabin was completely filled with passengers. During the accident all of the seats tore free, due to failure of the seat attachments; over 62% of the aircraft's occupants were fatally injured.

The occupants originally sitting in this intact area of the plane should have survived with little or no injury. However, failure of their seats permitted them to become high speed—human—missiles.

What are the reasons for failure of passenger tie-down such as that just discussed? One reason appears to be the type of testing that seats, their tie-down and associated floor structure are subjected to. At the present, so-called "static" test conditions are utilized. This involves anchoring a passenger seat to a steel rig and applying a load progressively to the seat—via the safety belt— and measuring the deflection of the seat as it is brought up to a load equalling the minimum strength requirements. This load is applied over a relatively long period of time, measured in seconds or more. If the seat does not fail, it is accepted by the FAA as having met the requirements.

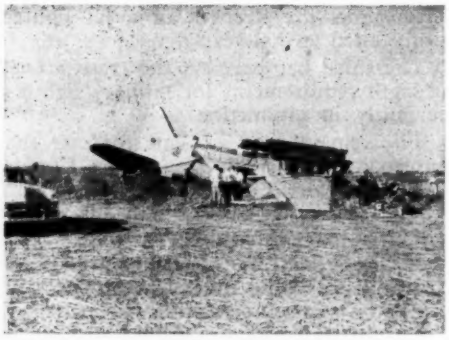


Figure 9

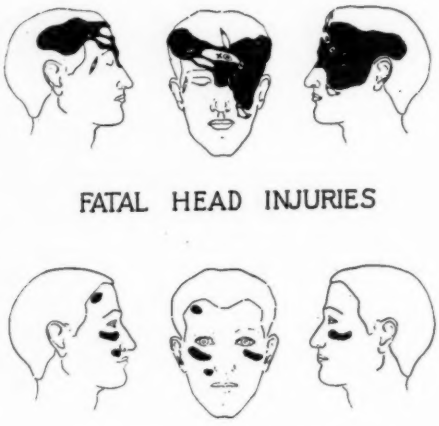


Figure 10

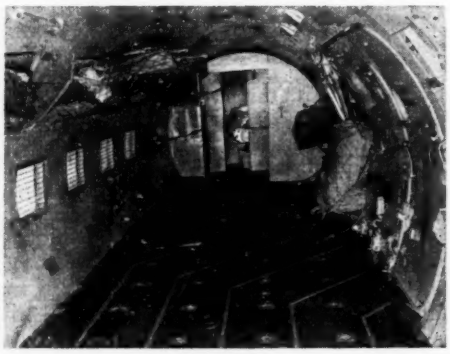


Figure 11

Unfortunately, such testing is unrealistic in relation to the force conditions imposed during an actual crash. During a static test, the seat structure has sufficient time to stabilize itself in relation to the stresses imposed within its structure, utilizing each structural member to the fullest extent in resisting failure. However, the forces applied to a seat in a crash are imposed almost instantaneously—measured in time increments of as little as 200ths of a second. Due to this limited time, some portions of a seat structure may not have time to stabilize their stresses. When this occurs, some parts become overloaded — or overstressed — and fail.

It is evident, therefore, that dynamic methods should be used in testing seats and other such components (simulating survivable force conditions) in order to prove the seat capable of withstanding typical crash conditions. Some engineers feel that the use of dynamic testing may result in seats of much greater strength with little or no penalty in added weight—making increased crash safety a most worthwhile economy.

Many persons sustain injury — sometimes fatal — in survivable accidents because of a lack of delethalization. Originated by AvCIR, the word means to design, or locate structure so that it will not be potentially lethal when struck by the human body. As an example of the absence of delethalization, Figure 12 shows how a crew member was killed in an intact — survivable — cabin during an accident.

The crew member jackknifed over the safety belt, striking her head against the only lethal item in the area — the rigid top of a fire entinguisher.

This fire extinguisher was installed in the area shown in Figure 12 to facilitate quick use in case of a fire in the passenger cabin; this location was well chosen for this particular use. However, a number of other locations just as suitable, and out of range of the crew member's head, were available. Obviously no consideration was given to potential injury exposure in locating this piece of equipment. In other words, the location of this fire extinguisher was predicated on the idea that the aircraft would not crash.

In this same aircraft, heavy food ovens and other equipment are stored in a galley located in the rear of the aircraft. The ovens are "locked in" by manually operated latches. Apparently one of the latches was in an unlocked position prior to the crash; an oven pulled free from the galley (Figure 13) in the crash and hurtled, missile-like, the full length of the cabin. It undoubtedly struck some of the passengers in its path.

In this same accident, all but the last row of seats tore free. During the investigation, they were lined up outside of the airplane in their respective positions (Figure 14). Most of the seats—some with their occupants — were thrown through a large hole in the fuselage and were then

Figure 12

Figure 13

"squashed" by the fuselage as it skidded along the crash path.

Some of the occupants who were not "run over" survived; one reason for their survival was the delethalized design of the seat-backs in this aircraft. These seatbacks, of soft, ductile metal and covered with padding, cushioned the head blows sustained by the occupants as they jackknifed over their seat belts.

A post-crash fire can be an extreme hazard for those who survive the impact. Studies by the National Aeronautics and Space Administration at the Lewis Research Center, Cleveland, Ohio, show that all passengers must be evacuated from a transport aircraft *within* one and a half minutes if they are to survive such a fire. This time limit is important in relation to the number and location of emergency exits — and whether they are usable. For example, Figure 15 shows a helicopter after it crash landed and burst into flames within two hundred yards of an airport fire station. Despite the close proximity of fire fighting equipment and personnel, the co-pilot died from burns because of his inability to get out of the aircraft quickly. Had there been passengers aboard, many would probably have received fatal burns because the only door, as well as the emergency exit in one compartment, had jammed shut. This jamming was a result of structural distortion during the crash landing.

Figure 14

Fgure 15

In the field of general aviation (business and personal flying) our analyses indicate that probably one hundred or more people are being unnecessarily killed each year because of a lack of adequate crash safety design in general type aircraft. In a recent Av-CIR study of 913 accidents of contemporary light aircraft—involving 1596 persons—it was found that approximately 56% of the aircraft cabins were only damaged to a relatively minor degree. However, approximately 37% of the total fatalities in these 913 accidents occurred in these relatively intact cabins. This is graphically shown in Figure 16. Theoretically, no fatalities should have occurred in conditions of such "light" damage. Too, no one should have received dangerous injuries. It is also interesting that a large percentage of the accidents involved impact speeds of *less* than 60 miles per hour.

These high rates of fatal and dangerous injuries in relatively intact cabin structures indicate a major need for (a) delethalized design of cabin interiors, (b) increased strength of seat and safety belt tiedown and (c) the installation and use of shoulder harness.

A rather high incidence of spinal injury —of interest probably, from an insurance claims point of view— often results from inadequate crash safety consideration in the design of seat-pans, cushions and underlying structure, as well as due to the lack of shoulder harness.

Another example of a break down in crash safety design thinking is shown in Figure 17. Typical of a private flying accident, the pilot (with three hundred hours flying time) became lost and ran out of gasoline. During his approach to an emergency landing he allowed the aircraft to stall at a low altitude; one wing tip struck the ground and the aircraft cartwheeled. The impact was moderate and the pilot's only injury was a fracture of one hand. However, the co-pilot was *killed*. When the co-pilot jackknifed forward

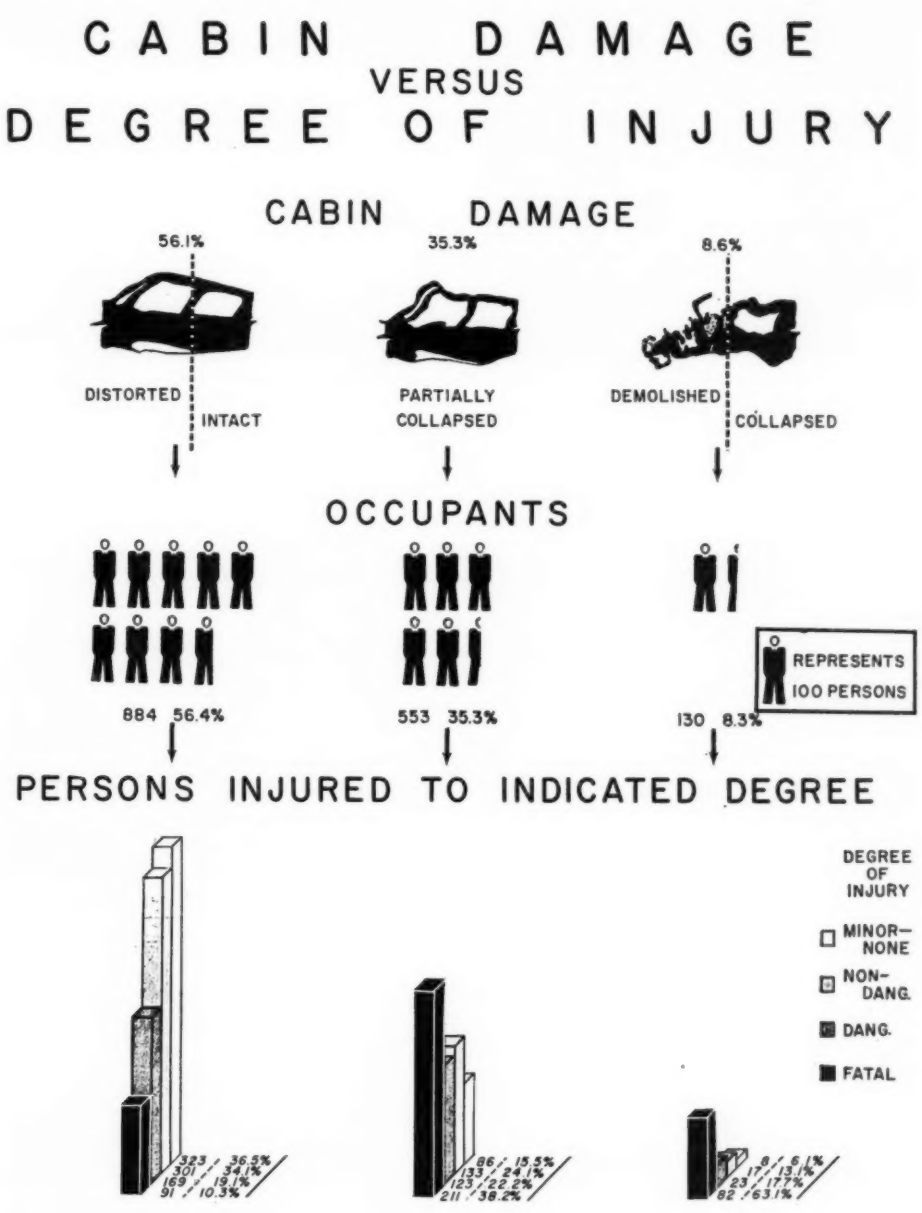

CABIN DAMAGE
VERSUS
DEGREE OF INJURY
CABIN DAMAGE
56.1%
35.3%
8.6%
DISTORTED
INTACT
PARTIALLY COLLAPSED
DEMOLISHED
COLLAPSED
OCCUPANTS
REPRESENTS 100 PERSONS
884 56.4%
553 35.3%
130 8.3%
PERSONS INJURED TO INDICATED DEGREE
DEGREE OF INJURY
MINOR—NONE
NON-DANG.
DANG.
FATAL
323 / 36.5%
301 / 34.1%
169 / 19.1%
91 / 10.3%
86 / 15.5%
133 / 24.1%
123 / 22.2%
211 / 38.2%
8 / 6.1%
17 / 13.1%
23 / 17.7%
82 / 63.1%

Figure 16

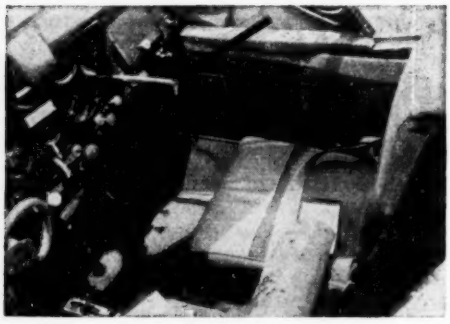


Figure 17

over the seat belt, one shoulder struck the corner of the control wheel, breaking the wheel free from the steel pushpull tube; this "spear" pierced the co-pilot's chest, inflicting fatal injury – the designer of the attachment of the wheel to the tube did not consider the possibility of the wheel being struck unsymmetrically.

Throughout years of research on causes of injury in small plane accidents, Av-CIR has amassed evidence showing that the installation and use of shoulder harness in aircraft would drastically reduce the fatal and dangerous injury rates in survivable type accidents. A study of sixty nine accidents involving surplus military aircraft flown by civilians dramatically demonstrated the benefits derived from the use of shoulder harness. When harness was used (Figure 18) there were no cases of dangerous head injury. When harness was not used (third column) there were twenty cases of dangerous head injury in these 69 accidents.

TABLE II

Seriousness of head injury in relation to effectiveness and use or non-use of shoulder harness.

Head Injury	Harness Used and Effective	Harness Used but Ineffective	Harness Not Used	Total
Dangerous	0	3	20	23
Non-Dangerous	1	2	11	14
Minor	5	2	20	27
No Injury	4	0	1	5
	10	7	52	69

Figure 18

Although crash safety design has not yet attained its proper and rightful place in aircraft design philosophy, there *are* a few aircraft types in which such design precepts have been used.

A twin engine aircraft, designed for crash safety and widely used in civilian and military aviation is shown in Figure 19.

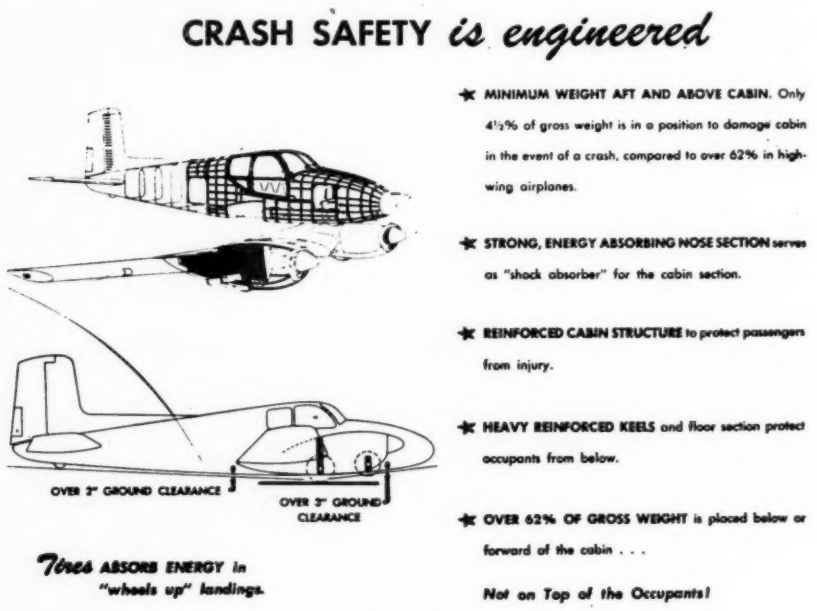


Figure 19

Investigation of several survivable accidents have shown this crash safety design has "paid off" in a lack of serious or fatal injuries in severe crashes.

The major mass (structure) of this aircraft is underneath the occupant; this lets the occupant ride on top of the wreckage, rather than being crushed beneath it. The plane also has a long nose structure that soaks up crash energy. Too, it has a skid-like structure that aids in preventing the nose digging deeply into the ground. The strength of the safety belts and shoulder harness also exceed, by far, current CAR requirements.

A transport aircraft which struck a moderately steep embankment at approximately 100 miles per hour, during a crash test, is shown in Figure 20. Although the lower part of the cockpit was collapsed, the entire passenger cabin remained completely intact. With adequate tie-down of seats and safety belts and the use of delethalized design of interior cabin structures, all passengers in such a crash could "walk out" with no difficulty.

Some years ago, the NACA (now NASA) crashed a number of small training type planes, to provide crash load data which could be used in developing crash safety design criteria. Unfortunately, this data has been given too little consideration by the CAA (now FAA) and industry. However, this early crash test work caused NACA to broaden its crash test investigation into the crashing of fighter aircraft and transports. Concurrent studies involved finding the causes of post-crash fires; the causes were isolated and identified and, more important, recommendations for means of preventing such fires were developed and published. In addition, a practical fire suppression system was developed by NACA and was tested by the Air Force as a possible installation for jet transports. Unfortunately, this crash fire suppression system has not yet appeared on any of these transport aircraft, nor is there a CAR requirement for its use.

Figure 20

The relative merits of rearward and forward facing seats will not be discussed here for it would take more time than is available in this paper. However, research on the subject indicates there are many factors to be considered when choosing one or the other. Basically, neither is better if the seats are inadequately tied down, because a major cause of fatal and dangerous injury in survivable accidents is that of allowing the occupants to become high speed missiles.

It has sometimes been said that lawyers are a detriment to aviation safety because of their reluctance to permit clients giving personal information on an accident, and the facts therein. Attorneys could make an outstanding contribution to the furtherance of aviation safety by aiding in the dissemination of information useful for research—such as that conducted by Av-CIR. Through proper communication between attorneys and safety people and through cooperation with such groups as the Federal Aviation Agency, the Civil Aeronautics Board, Aviation Crash Injury Research and others striving to make flying more safe, vast improvements could be made.

In closing it might be well for all of us to remember that statistics can be misleading. Just because only a few people are killed for every hundred million air miles is no reason for us to be complacent. Such complacency can prove fatal, financially, as well as otherwise. Personally, like you, the writer does not like being a statistic; if only a few of us are killed in an accident—*unnecessarily*—then we cannot be complacent about statistics.

CHAIRMAN WHITEHEAD: I am sure that the Association wants to join with your Open Forum Committee in expressing appreciation to Mr. Oscar Bakke and Mr. A. Howard Hasbrook for telling us so much about the work they do. Certainly, the task of the Open Forum Committee has been made very simple when people who are so dedicated and interesting will take the time to prepare and present so interesting and meaningful accounts of their war on aviation safety.

So, thank you very much, gentlemen, and our thanks to you for being such a responsive audience.

WEDNESDAY MORNING SESSION

July 1, 1959

The meeting reconvened at 9:00 o'clock, a.m. Chairman George I. Whitehead, Jr., presiding.

MR. GEORGE I. WHITEHEAD, Jr.:

Mr. President, members of the International Association of Insurance Counsel, ladies and gentlemen: When Arthur Blanchet asked me to serve as the Open Forum and Panel Discussion chairman, I told him that while I appreciated his invitation and that it was very complimentary, and I was glad to serve the Association, he must know that I did not know anything about anything but aviation, and the way things have been going in aviation negligence cases lately, I am not sure I know anything about aviation.

We agreed at the outset that it would probably be too much to have two sessions of pure aeronautics so, in our second session, we agreed to have something of interest to all the lawyers. Then, too, I didn't have to know anything anyway with the very fine vice chairman, Gerry Hayes, and a talented committee, and a panel of distinguished speakers to carry the ball. So, on that basis, I accepted the appointment.

As we began to think more about the format and material for this second session, we seemed to swing around inevitably to the trial of aviation negligence cases and, if you think about it a little bit, I think you will agree, as I have always suspected, that there is nothing new under the sun and that the techniques and strategy used by lawyers in the trial of an aviation negligence case or any negligence case, for that matter, must be pretty much the same as used by the trial lawyers successfully through the years.

What we are going to give you today may seem like sort of a potpourri of things. We do have an idea, as a general theme running through this presentation today, and I hope it is not too subtle a thread – the idea that basic legal principals and strategies and techniques are adaptable to most any factual situation, even though the nomenclature, the lingo of the trade, so to speak, may seem strange.

I have a little note I want to pass on to you. I don't know whether you can adapt this to your office or not, but this appeared in the Flight Safety Foundation bulletin. "Aircraft emergency procedures are printed on large cards which are located in the toilet stalls. There is a different system covered in each stall on the inside of the doors."

The idea is that if a different stall is used each day the pilots will review all procedures during those "idle moments." I think we may be able to use that in our shop somehow or other. (Laughter.)

We have two guests from Canada, and we have two member speakers, all of whom are interested in aviation matters, but I haven't heard that any of them have been turning down business from earth-bound happenings. As a matter of fact, the other night these two were talking and one was talking about coal mines in Newfoundland and the other was talking about a duck boat and a gunshot wound arising out of personal accident coverage.

Our first speaker is going to be Bert Richardson, Queens Counsel, from Winnipeg. Mr. Richardson was a pilot in World War I for the Royal Air Force, before any country had an air force as such. As a matter of fact, he was training American

pilots in 1917 in Texas. He is the senior partner of the firm of Richardson, Richardson, Huben & Wright; a past president of the Winnipeg and Manitoba Bar Associations; and, he was one of the first (and still is) Canadian editors of the United States-Canadian Aviation Law Reports.

For many years, he has been the general counsel to Western Canada Insurance Underwriters Association and regional counsel to the Canadian Underwriters Association. I understand, too, that if you are ever in Winnipeg and feel that you need some exercise, Mr. Richardson will be very happy to give you a figure skating lesson. It gives me a great deal of pleasure to introduce our guest speaker, Bert V. Richardson, Q.C., of Winnipeg.

Aeroplane Accident Cases In Canada

BERT V. RICHARDSON, Q.C.
Winnipeg, Manitoba, Canada

IT may be of help to members of the association outside Canada if I point out certain of the possible differences or distinctions in Canadian law. Time will permit of only a brief mention of such possible distinctive features.

CONSTITUTIONAL LAW POSITION: Apart from statute law, the English common law is the basis of the law of Canada except for the province of Quebec where the basis is the French Civil Code. It is surprising how near to being of the same effect such two systems really are.

For practically all purposes it has been decided by the courts that the federal parliament has exclusive jurisdiction over the subject matter of aeronautics and that the provinces have none. (See reference regarding aeronautics in Canada in reference to aero navigation, A.G. Can. the A.G. Ont. (1932), 1 D.L.R. 58, A.C. 54, 39 S.C.R. 108 (1931) 3 W.W.R 625). More recently this has been even held to apply to provincial legislation pertaining to even the location of airports (See *Johannesson v. Rural Municipality of West St. Paul* (1952), 1 S.C.R. 292) This is an important distinction as between Canada and at least the United States of America. It will be later pointed out that certain phases of the provincial statutes affect the aviation carrier but such statutes are not peculiar to the law of aviation.

WARSAW CONVENTION 1929; *Application to Canadian territory*: When the terms thereof are applicable, the Warsaw convention applies to aeroplane crashes in Canada and to Canadians irrespective of where the crash occurs, Canada becoming a party to the convention when its ratification and adherence was filed June 10th 1947.

THE ROME CONVENTION: Canada is a party to the Rome Convention but comparatively few other countries are and the convention applies only as between Canada and such other countries as are signatories thereto.

COMMON CARRIERS: The aircraft carrier in Canada is not necessarily always a common carrier. The facts as to whether the air carrier is a common carrier and therefore subject to the more strict rules as to liability should therefore be investigated when one is considering claims for or against a carrier for at least goods carried.

PUBLIC POLICY NOT A DEFENCE: Limitation of liability by contract is not, in Canada, against public policy. So far as such principle of law is concerned, it is possible in Canada for the aircraft carrier to limit and indeed to exclude all liability and this even where negligence is proven, and to exclude the claims of the estate of the passenger who has lost his life in an aeroplane crash. (See *Ludditt et al., v. Ginger-Coote Airways Ltd.* (1947), 2 D.L.R. 241, 1947 U.S. Av. R1.) Claims of dependents as given to them by the fatal accidents acts of the provinces cannot be excluded.

For all practical purposes however, complete removal of liability by contract is now seldom available to the carrier because in order to carry passengers and goods the carrier must be licensed by the Department of Transport and must file with the department what is commonly known as a "tariff manual" and such manual will be rejected by the department unless the terms of limitation of liability are considered reasonable by the department under the circumstances. The department however considers it reasonable for the carrier to limit his liability to $20,000.00 in respect of each passenger. The Warsaw Convention is of course for a still lesser liability where such convention applies namely at present rates of exchange about $8,100.00 in Canadian funds. The department will also permit a limitation to the effect that there is no responsibility for personal property carried by a passenger, and that unchecked baggage or other personal property is carried at the passenger's risk; that the carrier will not be responsible for delay in the delivery of baggage except through its own fault or neglect; that money, jewelery, silverware, samples, commercial papers, securities and similar valuables or business documents will be carried at the sole risk of the passenger; that the carrier will be in no way responsible for

damage to or loss of baggage unless the container or receptacle in which the same is carried is securely locked or fastened; that the liability of the carrier, if any, for loss or damage to baggage checked with it by a passenger will not exceed $100.00 unless the passenger declares a higher valuation in advance and pays a charge for such additional valuation.

LIMITATION OF ACTION — Other than Statutory; The Department of Transport will also permit a carrier to make it a term of the carriage that no action shall be taken for injury to or loss of life of a passenger unless notice of such claim is presented in writing to the Head Office of the Company within 30 days after the occurrence of the injury or loss of life, and unless the action is commenced within one year after such occurrence.

STATUTORY PERIODS OF LIMITATION: Apart from contract, there is a statutory period of limitation for the bringing of actions by dependents for loss of pecuniary expectancy which, apart from possible suspension of limitation in favour of infants or others under disability is twelve months or one year in all provinces other than Newfoundland where the period is six years. The period of limitation under the Warsaw Convention is 2 years, as provided by the convention, and under the Rome Convention is one year also as in the convention provided.

DAMAGES: Perhaps because in many of the provinces damages are not assessed by juries but in any event, damages for personal injuries and death are generally assessed by the Canadian courts on a basis surprisingly lower than would appear to be the case in at least the United States of America. The claimant who must bring his action within Canada would likely find that the court's award would be much reduced from what he might recover in at least some other countries. Except for the limitations elsewhere herein stated there is of course a claim for damages for personal injuries which would include pain and suffering and shock as well as loss of earnings and earning capacity and extra expenses necessarily incurred. There is also a claim by "dependents" for loss of pecuniary expectancy. This is a statutory claim and while there is general uniformity as to who are classified as dependents there is not full uniformity in such statutes, and the provincial statutes should be consulted on such question of who are dependents.

LOSS OF EXPECTATION OF LIFE: DAMAGES FOR: In most, if not all of the provinces, a person who survives an accident but can prove shortening of his life is entitled to additional damages for such loss of expectation of life. Then, in the provinces of Alberta, Manitoba and Newfoundland the estate of a person losing his life in an accident has, if liability can be established, a right of action for damages for loss of expectation of life.

NO DUPLICATION IN DAMAGES: Duplication of damages is not permitted and therefore any amount recovered for loss of expectation of life after death, being an award to the estate, increases the estate and therefore reduces the amount recoverable for loss of pecuniary expectancy by those who can establish themselves as dependents. See *McEown* v. *Royal Canadian Fuel Co.*, 1949 O.W.N. 303 and *Sershell* v. *Toronto Transportation*, 1939 S.C.R. 287.

WORKMEN'S COMPENSATION IN REDUCTION OF DAMAGES: This is always an item which in Canada should be carefully investigated. Workmen's compensation law is a matter for the provinces. Pilots, co-pilots and crew for the most part come under the provincial workmen's compensation statutes. Many persons travelling by air and travelling in the course of employment are classified as also coming under workmen's compensation. A more or less general provision of the workmen's compensation statutes of the provinces of Canada, takes away the right of action in the courts for the substituted right to claim for workmen's compensation, and where the employer of the injured party and the employer of the negligent party are both under the act, then all rights of action have been taken away. It is therefore quite possible in Canada that neither the injured passenger nor his dependents have any right except to claim under the provincial workmen's compensation statute.

CONTINGENCY BASIS FOR FEES: It has been suggested to me that I should include a note on this subject. It may come as a surprise to insurance attorneys from some of the other countries represented here that, almost if not quite without exception, the provincial governing bodies controlling the legal profession in Canada

have outlawed the taking of litigation upon a contingency basis as to fees. It is rumoured that where such arrangement can be entered into it greatly adds to the cost of insurance claims and therefore of insurance.

INVESTIGATION: I have been asked to mention this phase. You have heard in detail from my good and learned friend Mr. Alistair R. Paterson on the investigation afforded by the Department of Transport, and the availability of their records or lack of such availability. Insurers of aircraft carriers will find that in at least certain of the larger centres of Canada one or more of the better adjusting companies have upon their staff personnel experienced in investigation of aviation accidents. That this is a field of investigation in itself must be admitted. Distances and, in Canada, the inaccessibility of our Far North makes investigation difficult to say the least. Then, of course, aeroplane accidents so often result in the death of all members of the crew.

RES IPSA LOQUITUR; This brings us naturally to the rule of evidence res ipsa loquitur. It will apply in Canada to put the onus upon the aeroplane carrier in cases of crashes which occur in or shortly after take-off (*Fosbroke-Hobbes v. Airwork Ltd.* (1937), 1 ALL-E.R 108, 1938 U.S.Av. R 194), and in crashes occurring in what would appear to be a normal landing and approaches thereto. (*Malone v. Trans-Canada Airlines* (1942), 3 D.L.R. 781, 1941 O.W.N. 238, 1942 U.S.Av.R 144). It has not yet been applied against a carrier in crashes or in disappearances of aircraft in normal flight, but it is submitted that it would take very little evidence, such as proof that the craft was not at its prescribed height above ground or was off course, to shift the onus to the carrier. Perhaps it was rightly said in the very recent case of *Trihey and Transocean Air Lines Inc. et al.,* 1958 U.S. and C. Av.R. 500 that as knowledge about aviation accidents increases, the basis for applying the rules increases also. In Quebec the rule of presumption of fault is closely analogous to the rule res ipsa loquitur.

TRESPASS AND NUISANCE IN AIR SPACE: This undoubtedly covers property and civil rights, and property and civil rights are by the British North American Act assigned to the provinces. Nevertheless, it is, I believe, generally accepted among Canadian lawyers that when dealing with the question of trespass and nuisance by the flying machine it becomes a matter of aeronautics and that the courts would have to hold that as such it is solely a matter for the federal parliament.

It would seem to me only reasonable to assume that before many more years have passed it will be considered by the federal parliament necessary that reasonable interference or trespass, and nuisance not unreasonably created, should be permitted by statute. If, as I have suggested it is a matter for the federal parliament then perhaps Canada is in a uniquely favourable position to meet and settle the problems of noise and air disturbances created by the ever increasing speed of aircraft.

EXPERT EVIDENCE: Provided that the witness can be qualified as an expert, such evidence is permissible and proper evidence. Some of our judges have said some harsh things about the value of the evidence of experts. Most if not all the provinces have a court rule limiting the number of experts which can be called by either side of the case, generally to three, unless permission to call a greater number is obtained prior to the calling of the first of such experts.

DISCOVERY: Pre-trial discovery is not only permissible but in general use. Speaking generally, it can be obtained by viva voce examination or by administration of interrogatories, and in certain of the provinces the rights are cumulative. There is however, an important distinction in Canadian law over the law or practice in certain other countries. Discovery can only be obtained from the parties to an action, the plaintiff or defendant, and where the party is a corporation by the examination for discovery of an "officer." However, the term officer has been liberally interpreted, and in some jurisdictions at least would include the pilot, should he survive the crash, and if for no other purpose than making certain of the right to examine the pilot he is often added as a defendant. It should be noted that unless the pilot's examination is as an officer of the airline the pilot's examination for discovery cannot be read in as evidence against the airline but only against the pilot. There is no right of examination for discovery of persons merely because they are witnesses to the accident in question in the lawsuit.

JURY TRIAL: Trial by jury of civil actions is not always available to the parties to an aircraft accident lawsuit. The applicable rules are provincial and differ somewhat in the different provinces. Certain provinces, of which Ontario is an example, give a right to trial by jury to either party who may desire the same, this by merely giving notice of trial by jury. In certain other provinces juries are not a matter of right and can only be obtained, if at all, upon special application to the court. In such provinces, in aviation accidents, the courts have sometimes denied a jury trial on the ground that highly technical evidence may be submitted and the same, it is hoped, will be better understood by a judge rather than by laymen jurymen. See *Nystedt v. Wings Ltd.* (1940), 48 Manitoba Reports 110.

APPEALS: There is an invariable right of appeal to the Provincial Court of Appeal from a judgment at trial. There is, in cases involving damages fixed at $20,000.00 or more, a further right of appeal to the Supreme Court of Canada. There is no further right of appeal, the former right of appeal to the Privy Council being now abolished.

COSTS: Provincial rules, which are the rules applicable, vary considerably from province to province but in all Provinces the successful party can be allowed what are known as party and party costs, which include certain disbursements necessarily made by the party in the conduct of the case. Such disbursements are taxable without limitation as to amount. There is however, generally speaking, a limitation as to the fees taxable by the successful party although, again generally speaking, in cases of unusual difficulty or importance the court can increase or entirely remove the statutory limitation as to taxable fees.

CHAIRMAN WHITEHEAD: Thank you, very much. Our next speaker is a member of the Association and a leading trial lawyer in the United States. He was on active duty in the United States Navy as an aviator for four and a half years during World War II. Mr. Junkerman is currently the chairman of the Committee on Aeronautics of the New York State Bar Association and has been for the past four years. He, too, is an editor of the United States-Canadian Aviation Law Reports.

While he has been interested in a number of important lawsuits, the one that stands out in my mind in particular, perhaps because my own principals had quite a bit at stake, is his rather epic battle with Harry Gair in the case of Jane Froman versus Pan American. Also, Mr. Junkerman was the defense counsel for the airline in the Mt. Carmel case, the CO2 problem that Oscar Bakke spoke about in his talk yesterday.

Mr. Junkerman's subject, "Admiralty and The Ocean Air Lanes," provides a good illustration, it seems to me, of an area in which legal principals in a factual situation are of considerable interest to ocean and marine people and others.

It gives me a great deal of pleasure to introduce our member speaker from New York, Mr. William J. Junkerman.

Admiralty and the Ocean Air Lanes

WILLIAM J. JUNKERMAN
New York, New York

THE admiralty is one of our oldest branches of the law. Yet it is interesting to reflect upon the extent to which it has been interwoven with our newest form of commercial transportation over the high seas.

Imbedded in the United States Constitution is a recognition of the fact that a general system of maritime law existed at the time of the formation of the country. Thus, Article III, Section 1, of the Constitution provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." and Section 2 thereof, provides that "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction".

However, since the Constitution did not undertake to define the limits of that body of law, the question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or act of congress or rule of court can enlarge or broaden what the judicial power may determine those limits to be.[1] This is not to say that the framers of the Constitution contemplated an unalterable body of maritime law. On the contrary, since the Constitution conferred upon Congress the power to make all laws "necessary and proper" for carrying into execution all powers "vested by this constitution in the government of the United States, or in any department or offices thereof", it has been uniformly held that Congress has the paramount power "to alter, qualify or supplement" the maritime law "as experience or changing conditions might require".[2]

By a provision of the Judiciary Act of 1789, now embodied in §1333 of the Judicial Code, the district courts were given original jurisdiction of "Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

It has been held that this "saving to suitors" clause makes no affirmative grant of jurisdiction but merely excepts from the exclusive admiralty or maritime jurisdiction of the United States district courts all cases in which suits may be brought to obtain other than admiralty remedies to which suitors are "otherwise entitled." Unless a plaintiff is "otherwise entitled" to a remedy at law under section 1331, which grants to district courts "original jurisdiction of all civil actions * * * arising under the Constitution, laws or treaties of the United States, " the modifying clause under section 1333 will not be of any avail to him.[3]

During the history of our country there have been many conflicting decisions with respect to the jurisdiction of federal or state courts in tort actions as a result of this "saving to suitors" clause. However, in January 1954, the United States Supreme Court made the following definitive statement on the subject:

> "* * * Admiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. * * * It is this kind of *in rem* proceeding which state courts cannot entertain. But the jurisdictional act does leave state courts 'competent' to adjudicate maritime causes of action in proceedings *'in personam,'* that is, where the defendant is a person, not a ship or some other instrument of navigation. * * * Aside from its inability to provide a remedy *in rem* for a maritime cause of action, this Court has said that a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' * * *"[4]

[1] *The Steamer St. Lawrence*, 66 U. S. 522, 527.
[2] *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 386; *Detroit Trust Co. v. The Barlum*, 293 U. S. 21, 43.
[3] *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615, 2 Cir.; *Jordine v. Walling*, 185 F. 2d 662, 3 Cir.; *Romero v. International Terminal Operating Co., et al.*, 358 U. S. 354, 368, Feb. 24, 1959.
[4] *Madruga v. Superior Court*, 346 U. S. 556, 560-561;

Consequently, in tort actions for personal injuries (other than those resulting in death) occurring to passengers on the high seas, the state courts would have jurisdiction of such actions if brought *in personam;* and the federal courts would not have jurisdiction of such actions on the civil side unless they involved diversity of citizenship.[5]

In personam actions for injuries to passengers on the high seas might be described as old hat insofar as surface vessels are concerned. Applied to aircraft over the high seas they are relatively new. Nevertheless, during the past ten years they have become somewhat commonplace in our state courts and in federal courts sitting in our maritime states and vary from the occasional serious injury caused by crash or by turbulence (rough air) to the more common "hot soup" or "banana peel" case. While the disposition of such personal injury cases has hardly created a ripple in the normal stream of litigation, other litigation involving passengers in aircraft over the high seas presents a different picture. These include (a) prosecutions for criminal acts and (b) negligent acts causing wrongful deaths.

Apparently, a complete legal vacuum existed with respect to criminal acts in aircraft over the high seas, or so Judge Kennedy ruled in *United States v. Cordova.*[6] That decision resulted in the enactment of a bill in Congress which filled that vacuum as to crimes by redefining the "special maritime and territorial jurisdiction of the United States" so that it specifically included crimes committed in United States aircraft "in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States."[7] Parenthetically, in the earlier case of *United States v. Peoples,*[8] Judge Roche, in strictly construing 18 U. S. C. A. §469 (§2199), which made it a misdemeanor for any person to stow away on a vessel, held that it did not apply to a stowaway on an airplane. Congress thereupon amended that section of the act by providing specifically that it did apply to aircraft as well as to vessels.

[5]*Cuozzo v. Italian Line, "Italia" —Societa Per Azioni, etc.,* 168 F. Supp. 304;
Romero v. International Terminal Operating Co., et al., supra.

[6]U. S. D. C., E. D. N. Y.; 89 F. Supp. 298; Mar. 17, 1950.

[7]18 U. S. C. A. § 7, Subdiv. 5.

[8]U. S. D. C., N. D. Cal.; 50 F. Supp. 462; June 18, 1943.

The history of wrongful death actions based upon negligence occurring on or over the high seas has been a tortuous one. By the common law no civil action existed for an injury which resulted in death. Actions for injuries to the person abated by death and could not be revived or maintained by the executor or the heir.[9] This was true whether the wrongful death occurred on land or sea. Lord Campbell's Act[10] changed this situation in England and it was the forerunner of all statutory wrongful death actions enacted by our several states. Thereafter, the right to bring a wrongful death action generally depended upon the *lex loci delicti* (the law of the place where the wrongful act took place). The courts in some of our states then attempted to extend the sphere of their wrongful death statutes to include deaths occurring on the high seas, and serious conflicts arose as the result of such decisional law—particularly in cases where deaths were caused by collisions at sea between vessels of two different states.

Actions were also brought in federal courts to obtain damages for wrongs causing deaths upon the high seas under the general maritime law. However, in *"The Harrisburg",*[11] decided on November 15, 1886, the United States Supreme Court decided that "no such action will lie in the courts of the United States under the general maritime law."

Finally, on March 30, 1920, Congress enacted the Death on the High Seas Act.[12] The creating section of that Act reads as follows:

"§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative

[9]*Insurance Co. v. Brame,* 95 U. S. 754.

[10]Act of Parliament of August 21, 1846, 9 and 10 Vict. C. 93.

[11]119 U. S. 199.

[12]46 U. S. C. A. § § 761-768.

against the vessel, person, or corporation, which would have been liable if death had not ensued."

After Congress preempted the field there was no longer any question about the fact that the Death on the High Seas Act was the only statute in the United States applicable for a wrongful act causing the death of a passenger on the high seas. However, considerable doubt existed as to whether the language of the act required that an action based on it had to be brought in admiralty or whether admiralty jurisdiction was merely permissive and that jury trials might still be had in state courts as well as in the civil jury parts of the federal courts. Following the effective date of the act a few district court decisions involving surface vessels held that the language of the act deprived any court, other than a United States admiralty court, of jurisdiction in such actions. However, in 1938, in the case of *Elliott v. Steinfeldt*,[13] the New York Supreme Court interpreted the act otherwise.

In 1941 the question of whether the Death on the High Seas Act was applicable to a wrongful death of a passenger aboard an aircraft first came before a United States district court in the case of *Choy v. Pan American Airways Co.*[14] In that case Judge Clancy had to make and did make several important decisions of first impression. The most important ruling that he made was that the federal Death on the High Seas Act did apply to the death of a passenger in an airplane which vanished during a flight over the Pacific Ocean. However, he also ruled that in the act the language "may maintain a suit for damages in district courts of the United States, in admiralty" did not give the admiralty court sole jurisdiction and that the act vested in the plaintiff a right to recover in a common law action in the district court. A month prior to Judge Clancy's decision the New York Supreme Court denied a motion to dismiss a jury action brought in that court arising out of the same accident as in the *Choy* case upon the ground that federal courts of admiralty did not possess exclusive jurisdiction under the act.[15]

For approximately eleven and a half years thereafter, the *Choy* interpretation of the foregoing clause of the act was accepted as authoritative with respect to both surface vessels and aircraft. Then came a series of decisions that resulted in a complete reversal of such interpretation of the act. They started with Judge Weinfeld's decision in *Iafrate v. Compagnie Generale Transatlantique*[16] when the court, after noting its disagreement with Judge Clancy's conclusion in the *Choy* case, ruled with respect to the death of a passenger on board a surface vessel "that jurisdiction under the Death on the High Seas Act is exclusively in admiralty."

The scene then shifted to California where United States District Judge Goodman passed upon a similar question in the case of *Wilson v. Transocean Airlines.*[17] That case involved an air liner that crashed in the Pacific Ocean about 325 miles east of Wake Island on July 11, 1953, killing all 58 persons aboard. After an extensive analysis of the history of wrongful death at sea, including the California Death Statute, the Death on the High Seas Act, and numerous reported decisions respecting the same, Judge Goodman ruled that the sole right of action which the plaintiff widow had in that action for the death of her husband was "that granted by the Death on the High Seas Act, and that this right must be maintained in admiralty."

Higa v. Transocean Airlines,[18] arose out of the same accident as that in the *Wilson* case. The appeal in the *Higa* case was from a decision of the United States District Court for the District of Hawaii in a diversity suit which dismissed the complaint because it was brought as a common law civil suit rather than in admiralty. In affirming the lower court decision that any such action had to be brought in admiralty, the United States Court of Appeals said (p. 785):

"Here, however, the Death on the High Seas Act creates the right to recover for wrongful death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. The right is a matter of federal law where state courts would have no special competence. There is more here than 'the grant of jurisdiction, of itself

[13] 254 App. Div. 739; 2nd Dept.
[14] U. S. D. C., S. D. N. Y.; 1941 A. M. C. 483.
[15] 1941 A. M. C. 912, 913; aff'd no opinion, 262 App. Div. 995.
[16] U. S. D. C., S. D. N. Y.; 106 F. Supp. 619; Aug. 11, 1952.
[17] 121 F. Supp. 85; U. S. D. C., N. D. Cal., S. D.; April 15, 1954.
[18] 230 F. 2d 780, 9 Cir.; Dec. 15, 1955.

* * *' which indicates that jurisdiction was intended to be exclusive."

The scene then shifted back to New York where the United States District Court for the Southern District of New York was faced with a similar problem in the case of *Noel v. Linea Aeropostal Venezolana*, arising out of the death of Marshal Noel in a Venezuelan air liner in or over the Atlantic Ocean, 32 miles from Asbury Park, New Jersey. In their original complaint plaintiffs alleged that Noel died when the plane crashed into the water. The action was based upon the Death on the High Seas Act and the Warsaw Convention, and plaintiffs demanded a jury trial. Judge Cashin dismissed the original complaint for lack of jurisdiction of the subject matter on the ground that (1) actions under the Federal Death on the High Seas Act are cognizable only in admiralty, and (2) the Warsaw Convention does not create an independent right of action.[19] Thereafter, plaintiffs amended their complaint and alleged that the death of Noel occurred in the airspace over the high seas. Plaintiffs contended that this allegation placed their case outside the admiralty jurisdiction of the court and gave them the right to bring an action on the civil side under the Warsaw Convention. However, Judge Cashin rejected this contention and dismissed the amended complaint, stating:

"Neither authority * * *, the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea."[20]

On appeal the United States Court of Appeals for the Second Circuit affirmed the dismissal of the amended complaint upon the ground that any rights created by the Federal Death on the High Seas Act are cognizable only in admiralty. Judge Lumbard, writing the opinion of the court said (p. 680):

"Plaintiffs contend that the phrase in the statute, 'may maintain a suit for damages * * * in admiralty,' means that a plaintiff may sue either at law or in admiralty. But the language and legislative history make it very clear that the permissive element relates solely to the grant of the right and not to the forum. Whereas before the Act a party could not sue under federal law for death on the high seas at all, now he may. * * *

* * * *

* * * We express no opinion as to whether the Death on the High Seas Act grants a right of action in admiralty for death in the airspace."[21]

Although the Second Circuit avoided deciding whether the act granted a right in admiralty for the death in the airspace in the *Noel* case, their avoidance of that question was not for long. In April 1957, between the time of Judge Cashin's decisions in the *Noel* case and the court of appeals' decision in that case, another case raising the identical question, to-wit: *D'Aleman v. Pan American World Airways, Inc.*, had been tried in the United States District Court for the Southern District of New York before Judge Dimock. That action involved an alleged wrongful act in the airspace over the Atlantic Ocean which resulted in the death of plaintiff's decedent. Convinced that admiralty jurisdiction was exclusive, Judge Dimock took this cause of action away from the jury and, sitting as a court in admiralty, decided it upon the merits in defendant's favor.

On appeal the plaintiff contended that Judge Dimock's action was erroneous and that her cause of action should have been submitted to the jury for decision. In rejecting such contention and affirming the action of the lower court, the United States Court of Appeals (Judge Moore) said:

"The facts of the case now before the court make a direct ruling on the question appropriate. To give to passengers on ships protection of the Act and deny similar rights to passengers in the air would amount to unjustifiable and highly technical discrimination.

We, t h e r e f o r e, now hold that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high

[19] 144 F. Supp. 359; Aug. 22, 1956.
[20] 154 F. Supp. 162; Nov. 29, 1956.
[21] 247 F. 2d 677, 680; Aug. 9, 1957.

seas and that the trial court properly heard the case in admiralty." [22]

But what, you may ask, of the situation where it is not clear whether the act causing death took place over the high seas or within a marine league of the shoreline of a state? What law then applies?

The United States District Court for the Southern District of New York had that very situation before it in October 1958, in three cases, to-wit: *Sokolowska v. National Airlines, Inc.* and *Douglas Aircraft Company, Inc.; Kessler v. Same;* and *First National Bank in Greenwich, etc. v. Same,*[23] arising out of the deaths of four passengers in a National Airlines plane en route from Tampa, Florida, to New Orleans, which crashed in the Gulf of Mexico near the state of Alabama. Because of the recovery of part of the wreckage close to the shore of the state of Alabama, the plaintiffs in all three actions had alleged alternative causes of action (1) to the effect that the accident occurred on the high seas more than a marine league from the shore of the state of Alabama; and (2) that the accident occurred within the territorial confines of the state of Alabama. Under the Alabama statute plaintiffs would have been entitled to a jury trail but under the Death on the High Seas Act the actions would have to be tried in admiralty without a jury. All three cases came on for trial before Judge Levet. He impaneled an advisory jury and a preliminary trial was held to determine where the accident occurred. The parties were in conflict as to whether the alleged wrongful act causing death occurred in the air space over the high seas, in the air space over Alabama, or in the Gulf of Mexico within or beyond a marine league from the shore of Alabama. After hearing all of the evidence relating solely to this question the jury rendered its verdict that the accident happened beyond a marine league from the shore of Alabama. The judge thereupon made independent findings of fact and conclusions of law in which he also found that the wrongful act occurred beyond a marine league from the shore of the state of Alabama. He thereupon dismissed the jury and sitting as a court in admiralty, tried the three cases on their merits.

One aspect of the Death on the High Seas Act not touched upon in any of the foregoing cases is that involving deaths caused by negligence on foreign aircraft on or over the high seas and suits based thereon in American courts. At first blush, Section 764 of the act would seem to cover this field adequately. However, when a foreign country does not have a statute or laws covering such situations the question arises whether Section 761 of the act may supply such defect for an American citizen or a foreign citizen killed in such foreign aircraft en route to or from the United States. Cases involving these questions are now pending in the federal courts of New York and New Jersey arising out of the Venezuelan Constellation crash in the Atlantic Ocean on June 20, 1956.

In addition to tort law where the paths of admiralty and aviation have crossed, there is another common path which should be mentioned. The International Rules of the Road For Navigation At Sea, 33 U. S. C. 144-147 (d), which relate to power-driven vessels and to sailing vessels, are also applicable to seaplanes. These rules include the lights that vessels and seaplanes shall carry while at anchor and while under way, the speeds at which they shall travel under adverse weather conditions, and requirements with respect to the avoidance of collisions.

Nevertheless, the Federal Aviation Act of 1958, 49 U. S. C. A., 1301-1542, like its earliest predecessor (the Air Commerce Act of 1926), contains a provision to insure the fact that general laws relating to vessels and vehicles shall not apply to aircraft. That section reads in part as follows (§1509):

> "(a) Except as specifically provided in sections 143-147d of Title 33, the navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft."

Consequently, special statutes relating to vessels such as the limitation of liability provisions, 46 U. S. C., Section 183, apply only to seagoing vessels of certain classifications and do not apply to aircraft.

Recently a seaplane pilot, whose primary duties were to fly a light plane to spot fish for a fishing fleet by which he was employed, filed a libel to establish a maritime

[22] 259 F. 2d 493, 495-496; Oct. 2, 1958.
[23] 5 Avi. 18,213.

lien for his wages as a seaman in relation to certain vessels. After a trial, the lower court concluded that the pilot was not a seaman and dismissed the libel. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment on the ground that the determination of the trial court was not "clearly erroneous".[24]

What effect man's adventures into outer space will have on aircraft over the high seas in the years to come is a challenging question for the future. However, one thing is certain—wherever man travels commercially, the law is sure to follow.

CHAIRMAN WHITEHEAD: Thank you very much, Bill.

I am now going to call upon our guest from Toronto, Alastair R. Paterson, who immigrated to Canada in 1953, leaving behind him in London an active and successful practice and a notable career as a solicitor. Mr. Paterson is a graduate of Cambridge University, was a partner in the firm of Beamont and Sons, and has six and half years of war service under the Scottish Regiment.

Since coming to Canada in 1953, his work in aviation matters has brought him recognition as a leading aviation attorney. He was counsel for the airline that had the public inquiry into an aircraft accident in Canada, and that was the tragic crash of a DC-4 near Quebec City in 1957, an assignment which certainly qualifies him to talk on the subject of fixing liability in public inquiries.

It gives me a great deal of pleasure to introduce our guest from Toronto, Mr. Alastair Paterson.

[24] *Chance v. United States of America*, 6 Avi. 17,433; May 13, 1959.

Fixing Liability In Public Inquiries

ALASTAIR R. PATERSON
Toronto, Canada

THANK you, gentlemen. Unlike some of you, I have never appeared before the Senate Investigation Committee, so I am not used to these microphones, nor television cameras, nor anything like that, so if at any time I don't get through on this, I hope somebody will start waving a white handkerchief at the back or otherwise signaling for help.

In the neck of the woods from which I come, we still have to project our voices so that the judges and jury will hear without all the benefits of modern science.

George mentioned that during the war I had the honor of wearing the kilt and serving under the Scottish Regiment. Although it has absolutely nothing whatsoever to do with this talk at all, as I said, during the war I had the honor of serving in the Scottish Regiment, and there is just one little quite true story that I would like to tell you.

In the early stage of the war, we were in training. We were stationed on the west coast of Wales, and the local inhabitants of a very small village near which we were trained, had been very kind to out battalion. At that time my colonel decided that, by way of a little gesture to the local inhabitants, it might be a good idea if our bagpipe man would go down and play on the village green.

So, I gave the necessary orders and in the afternoon when they were playing, I went down with my Colonel and there were a handful of inhabitants standing around watching the pipers as they marched and countermarched. So, my Colonel went over to an elderly man who was leaning on a stick listening and asked him how he was enjoying the music. The old man sort of appeared to consider for some time, and then, finally, he answered in a very broad Welsh accent. He said, "'Tis lucky they do not make a smell as well."

Well, gentlemen, I am apparently on the program to talk about fixing liability in public inquiries. From the release that was made by the publicity committee of this Association, I learned that this forum is really the negligence forum. You are all counsel for insurance companies and, as such, you are concerned with negligence cases. Some of you have no doubt had the opportunity of handling negligence cases relating to aviation, but some of you have not, and it is for those of you who have not had the opportunity that any remarks that I have to make this morning are addressed. For those of you who are experienced, then you must forgive me if what I say appears to be too familiar, but, first of all, may I let you into a little trade secret of those of us who try and practice in the field of aviation law.

Some of your friends who practice in this field may, from time to time, have tried to convince you that it is a very complicated and very technical field, a field that is fraught with all kinds of esoteric mysteries and things of that kind. To confound you, they may have interlarded their conversations with letters such as V.F.R., I.F.R., A.T.C., I.C.A.O., and I.A.T.A. They may use queer sounding words, such as Icao or Iata, and they may even have tried to confound you further by using the internationally approved phonetic alphabet and talked about such horrors as the Victor Foxtrot Roger or Able Tango Charlie.

Well, don't be put off by this jargon. They are really only trying to impress you perhaps, and it really isn't as complicated as all that. In fact, to handle aviation claims for the most part, we are only using exactly the same principles of law that you will use in your daily negligence work.

It is true that we have got some special legislation, and we do have to be reasonably familiar with things like the Warsaw Convention, or, up here in Canada, as the United States has not ratified it, with the Rome Convention. But, really, as I have said, after all the time, we are only using fundamentally exactly the same principles that you people use, only we are trying to apply it to perhaps rather a newer sphere of transportation.

Now, exactly the same thing is true when you come to the assessment of damages in aviation negligence cases. The principles of assessments of damages are exactly the same,

although, of course, if a claim arises under the Warsaw Convention, then there is an upper ceiling of liability in certain circumstances on the carrier.

The gentleman who has traveled by air from, say, Detroit to New York, on his honeymoon, immediately after his wedding in New York, and whose overnight bag gets mislaid by the air carrier, is only entitled to exactly the same damages for his alleged embarrassment at being deprived of his night clothes on his wedding night as if they had traveled by Greyhound bus. But, I should say though, human nature being what it is and plaintiff's counsel being what they are, the chances are that it might never have occurred to him or his attorney to make a claim for such acute embarassment from a bus line; but, I can assure you without any hesitation or contradiction that no one would ever fail to miss such an opportunity against an airline.

Frankly, by the time you have listened to his attorney ringing your ears with tales of the harrowing experiences of this young husband and the embarrassment that was caused to him and his wife by the fact that he hadn't night clothes, you may perhaps feel that the best thing to do is to make a very quick and rather generous settlement before the attorney gets around to thinking up a claim for the psychological disturbances that might be caused in any offspring that might be conceived on that fateful night. (Laughter.)

Also, I am sure that it must happen in other forms of transportation that from time to time one is so unfortunate as to upset hot coffee into a lady passenger's lap, but I have a sneaking feeling that it is only when it happens on an airline that you suddenly find yourself confronted with a claim for loss of consortium by her husband on the grounds that during the weeks while the lady's thighs were recovering, she was unable to give him his conjugal rights.

I hope, however, that I may have convinced you that those who handle aviation claims really do talk the same language as you do, even though, on occasion, we may appear to try to blind you with signs and using our own particular jargon.

When you were in school, before you were sent to write an essay or composition, you were told that the right thing to do was to make a skeleton framework of what you were going to say. You had to set down paragraph headings, starting: "Number one. Introduction," and going right through a lot of snappy headlines and finally ending on paragraph umpteen, "Conclusion."

In the Army, they used to teach us to do much the same thing, except, if I remember correctly, you had to start with "Information," which used to be divided into "Our own troops," and "Enemy troops," and then you went on with "Intention" and then you finally ended with a wealth of administrative details which are far too many for me to mention here.

Well, when I was asked to make this address to you, I remembered all that I had been taught, so I thought perhaps I should sit down and make a skeleton. For a while I thought perhaps I might use an Army plan. I hadn't any difficulty in deciding who my enemy was. That, undoubtedly, was your Open Forum and Panel Discussion Committee for landing me in this mess.

However, in the end I decided to go back to childhood, and so what I did was this: I got my secretary to bring me a beautiful new untouched pad of paper and, having moistened my pencil with my tongue, I proceeded with great labor to write down "Number 1. Introduction."

Well, you have had it. (Laughter.)

My second, I thought was an awfully good one. My second heading, I thought, "Negligence lawyers should be interested in fixing liability in public inquiries into aircraft accidents in Canada." I thought that was quite significant, but, unfortunately, when I came to fill in between the skeleton, put the flesh on the bones, I will be damned if I could think of a single good reason why you should be impressed. (Laughter.)

So, in my case, I will read you what I have got written down here, and this is what it says: "Search me." (Laughter.) "Ask George Whitehead." (Laughter.)

Well, gentlemen, now to our onions. For practical purposes, we can assume nearly every nation in Europe and the Americas is a member of the International Civil Aviation Organization, which in our jargon, we talk about as "Icao." It is so much less tongue twisting than talking about the whole thing. Icao was brought into existence by the Chicago Convention in 1944 and it has its permanent headquarters in Montreal. The member states agreed to collaborate in obtaining as much conformity as possible in regulations, stand-

ards, procedures and the like, in connection with civil aviation.

By and large, Icao works extremely well, and, I believe, has in large measure achieved its aims of setting international standards and bringing about uniformity in procedures, without which international civil aviation would be extremely difficult. As is only to be expected, difficulties do arise from time to time and unfortunately differences of opinion are news, whereas agreements on technical matters are not. Therefore, you are probably only aware of what is happening in Icao when there are disputes, as there have been very recently, over the rival claims of the British System of the Decca Navigator Flight Log over the United States sponsored system of Visual Omni range plus distance measuring equipment.

But, so far as accident investigation is concerned, there is general agreement between the member states of Icao, Annex 13, an unlucky number to the Chicago Convention, deals with accident investigation. As you would guess, and certainly would know if you were here yesterday afternoon when Mr. Bakke was speaking, accident investigation, of course, is a very important and fundamental part of air safety.

Now, Annex 13 does not attempt to lay down the method to be used in investigating accidents, only, really, that the member states must investigate accidents. It lays down certain broad principles. The way which they do it, the administrative meetings that they establish to do it, is entirely within their own power.

Bert Richardson eariler explained to you that here in Canada we have a federal system of government. Under our system, it has been determined that aeronautics is the sole prerogative of the Dominion government. It is not the concern of the provinces at all.

In Canada as, I suspect, in nearly every civilized country today, all accidents, both big and small, have to be reported, and in Canada they are reported to the Department of Transport of the Dominion of Canada. In the great majority of cases, these accidents are investigated by an official of that department. For minor accidents, I don't think you could reasonably expect any other form of investigation. In 1957 in Canada, we had some 548 reportable accidents, which was more than twice the number of accidents in the United Kingdom in that same year. Plainly, it would be absolutely impossible and quite ridiculously expensive to have a public inquiry into all accidents which, of course, vary from private airplanes running off the runway and nosing over without doing damage to anybody, to the major airline crash, resulting in horrible consequences. The efficiency, of course, of the method of investigation by a government office or official must depend on the integrity of those officials, on the standard of their knowledge, on their training and skill, and, as Mr. Oscar Bakke made quite plain yesterday, on their standard objectivity, their ability to keep an open mind and to look at things in their proper perspective without preconceived ideas.

Until very recently, the government of Canada has tried to get by without establishing any department of accident investigation at all, and without having any specially trained or specially qualified personnel assigned to that work. Accident investigation was regarded no more than an additional chore to be tipped into the lap of the unfortunate regional inspector of air regulations, and he was made responsible for investigating any accident that occurred in his area. This unfortunate official was given no special training. He was given no special staff and he was expected to do the best he could. You will hardly be surprised to learn that the industry up here found this state of affairs very far from satisfactory.

The word apparently got through to the government that this was a thoroughly unsatisfactory state of affairs and on the first of January of last year, they took the first step towards establishing a separate accident investigation branch, and they are now holding training courses, and in a small way, they have begun to work towards the end of having a separate and properly qualified trained department. In my opinion, the steps that have hitherto been taken are still far from adequate, but nevertheless, they are now moving in the right direction. I suppose that when one is dealing with government, particularly when large sums of government money are involved, one must expect to be content with slow progress, provided that it is steady.

But, it isn't of the type of inquiry by an official that I want to speak this morning. I want to talk about public inquiries.

In Canada, we have now begun to have, as the United Kingdom has had for many years, a system of public inquiries into

major airline disasters. This type of inquiry has developed in the United Kingdom through the years and, modified for our conditions, is now used in Canada. As I understand it, it was largely modeled on the Marine Wreck inquiry, but I wouldn't be sure of that, because I am not an admiralty man. Those of you who know more about those matters may be able to correct me if I am wrong.

When there is a major civil aviation disaster, the Minister of Transport can, if he sees fit, make the administrative decision that a public inquiry should be held. Now, when he does that, it doesn't hold up the technical investigations which will, of course, have been started immediately after the accident is known about. What it does mean is that the teams investigating the accident will gather facts. It will not be for them to form opinions or conclusions. It is for them to gather all the facts.

Now, then, as you will see in a moment as I explain, those facts and all of the evidence is then submitted to a public inquiry.

A board is appointed to investigate the matter — a board of inquirers. The number of persons appointed to set on the board varies. It is usually three, but it may be more if that is thought to be convenient. The chairman is invariably a person with high legal qualifications. He may be a judge, but at least he will be a senior counsel with great experience. The qualifications of the remaining members of the board vary according to the type of accident. I am assuming that this is an airline accident, in which case invariably one of the members of the board will be a senior airline captain, preferably a man who has had airline experience on the type of aircraft that has been in the crash.

The qualifications of the other members of the board very much depend on the nature of the accident. Often they are persons with very high aeronautical engineering qualifications. There may be somebody from the aircraft industry itself, or it may be someone who is very highly qualified, somebody like a professor of aeronautical engineering. I have known cases where engineering was not going to be a problem and so instead of having a person with engineering qualifications, they appointed a man with very high qualifications in meteorology, because they were concerned in the accident with very violent downdrafts.

Sometimes, as in the report of one that I have here with me, they have four members. You might have some occasion to include a metalurgist of very high qualifications, if there was some reason to believe that the accident might have been caused, or attributed to, for example, the metal in the airplane.

Now, I would like to emphasize that not one of those persons is normally a government servant or connected with the government in any way at all. He is appointed because he is an outstanding person in his own field.

The board, as so constituted, sits in public for the hearing. The rules of evidence are substantially, but not meticulously, adhered to. Documents as a rule are admitted in evidence by consent of counsel without the necessity of calling for any formal proof. Noncontroversial matters may be proved by affidavit. In my experience, any controversial matter is strictly proved. It is also the right of counsel appearing for interested parties, if they think it necessary, to ask that a witness be produced so that they can cross-examine him.

In order that the facts, the evidence, may be properly and impartially presented to the board, counsel are appointed. They are appointed in the public interests. Their duty is to the public. Their responsibility is to call before the board all the evidence that is relevant to the matters to be considered. It is their responsibility to be completely impartial. They are not there to make a case against anybody. They are not to defend anybody. It is their responsibility to sift all the evidence and to exclude anything which is obviously quite immaterial. But, they mustn't try to prove this theory or that theory. They must call all the evidence and all the facts and present it to the board so that the board can arrive at their conclusion.

Sometimes they are designated as "counsel to the board." I fight against that title and I object to it very strongly, because there has been a tendency perhaps for such counsel on the board to feel that counsel have a right of access to the board when other counsel for interested parties are not there. That is not so. John Q. Public is just as much a party to these proceedings as the airline operator concerned or the manufacturer of the aircraft. There is not the slightest objection, in my view, to the board seeing counsel in private in order

to give directions as to what additional evidence they want to hear or what particular matters they want assistance in, but I think it is quite wrong that anything of that type should be permitted, just as between counsel who is appearing in the public interests and the board.

The order which appoints the board and convenes the inquiry also, usually, as I believe is the practice in Marine Wreck inquiries, poses a number of questions which the board is required to answer. Naturally, these questions vary considerably with the accident. Sometimes they are very simple and brief. I have one report of a public inquiry here, where the only two questions were: "1. What was the cause of the accident; 2. Was the accident due or contributed to by the act or fault or negligence of any party or any person in the employ of that party?"

On the other hand, I have a report here with me where no less than twenty-one questions were posed to the board to answer. They obviously range over a wide variety of matters and include such things as the time of the accident, the amount of fuel, the question of the load, the distribution of the load, and, also, of course, the fundamental questions, "What was the cause of the accident," and, "Was it caused by the wrongful act of any person?" In that particular case, all those questions were very relevant and that was why they were asked. The board has an absolute right to add to or subtract or amend the questions that are set to them, but, of course, they do not do so until they have given counsel appearing at the inquiry an opportunity to address them on the subject. Also, it is desirable that they should have that right, because in an inquiry things may crop up during the course of it, which could not reasonably have been foreseen in advance.

I would also like to point out that the board is not confined merely to finding the cause of the accident. That is to say, if you are appearing for an airline or manufacturer, don't waste your breath in trying to object that this evidence or that evidence is not relevant to the cause of the accident. This is an inquiry which is a fundamental part of air safety and therefore, if, during the course of it, it appears that something has been done which ought not to have been done and which affects air safety, it is perfectly proper for the board to investigate it even though it is abundantly clear that it could have absolutely nothing whatsoever to do with the accident.

I don't mean, of course, by that, that the board is going to have a roving commission and go roaming all over Hell's half acre. I don't mean that at all. But, for example, you can easily get a case where the evidence shows that an aircraft took off substantially overloaded. This is contrary to regulations. It may very well have been true, but the accident didn't occur until seven hours later, long after the overload has been burnt off in the shape of gas consumed and, at the time of the accident, the aircraft was properly loaded, and that load was properly distributed. It would be perfectly proper in those circumstances for the board to go into the question and to report on the question of the overload, even though it has nothing whatsoever to do with the accident.

Any interested party may apply to the board to be officially recognized as a party to the proceedings. You will be sorry to hear that in my experience insurers, as such, have no status and will not be recognized. I have tried, but I failed. However, the way I, personally, get around this difficulty is a very simple one, and would be obvious to you. Usually, what I do is to make an arrangement with the insured. You can usually get enough information in advance of a public inquiry to have a very good idea as to whether or not the insurer is likely to be in a position if they wish to refuse indemnity under the policy. It very rarely happens. In my experience over a number of these inquiries, (I suppose it has been about twelve or thirteen of them altogether,) in the United Kingdom and here, I have only known of one occasion when it was quite plain in advance that there would be obvious breaches of policy regulations and, therefore, all I could do was to go there as an observer and not take any part in the proceedings, because I knew full well that my client, in due course, would want to be in a position to repudiate liability under the policy. But, as will become clearer to you as I go along, it is absolutely of vital importance to the insurers that their case at the inquiry is properly presented and that their interests are properly safeguarded. You cannot do that adequately from the outside looking in, and that is why I always advise my clients, the insurers, to permit me to make an arrangement with the insured so that I can be on

the inside giving assistance and making sure that the case is properly presented.

In my experience, it usually works out in one of two ways. Sometimes counsel is agreed upon mutually and is mutually instructed, both on behalf of the insured and the insurers, but, of course, he appears at the inquiry purely as acting for the insured. Sometimes, with a large airline, they don't want that. They would rather, quite naturally, be sure that what they have to say is properly heard and presented. They may appoint their counsel. Insurers may appoint their counsel and the two counsel collaborate and, to all outward appearances, so far as the board is concerned, the two counsel are appearing jointly on behalf of the insured, which may be the airline or which may be a manufacturer or the claimants or it may be the manufacturer of some competitor. In my experience it hasn't yet become a common practice for either the airline operators or manufacturers of parts or components to ask for insurance coverage to be extended to include the cost of legal representation on such inquiries, and such legal representation is fairly expensive. Personally, I believe that insurers would be well advised to encourage their insured to take out such an extended coverage and, if they did, then I would think it would be perfectly proper for the insurers to include in their policy the usual type of provision that in no circumstances the insurers would have the right to take over and conduct the proceedings of the insurers' case at the proceedings.

The types of people who are normally recognized as being parties to a public inquiry of this kind are, of course, first of all, the operator of the aircraft; secondly, the manufacturers of the airplane or of the engines or of any components also, of course, have the absolute right to be made parties; whether or not they appear entirely depends on the accident. If it is quite plain that nothing detrimental is likely to appear so far as the air frame or engine or components, then it may very well be that they would not come at all or, if they do, they will merely have somebody watching.

The crew of the aircraft, of course, are nearly always represented. Unfortunately, in the aviation business, only too frequently, they aren't with us any more and so it is really their estates who are there.

In Canada, the air crew unions, as such, any more than the insurers, as such, are not recognized as being parties to a public inquiry, but they get around it in the same way as insurers get around it. They normally take over the conduct of the proceedings so far as the widows and estates of the air crew are concerned. So, although, normally, counsel is appearing for the estate of the deceased person, he is usually instructed or paid by the appropriate union.

The fourth category of persons who have a right to be a party to such inquiry is the passengers, or, again, unfortunately, very frequently their estates. It is, however, very remarkable on the face of it how very seldom they do appear. Sometimes they come, or some of them do, with a brief, but it is comparatively rare that they are ever represented by counsel who takes any active part in the inquiry. Now, this may seem very startling to you, but I don't think it is, really, for this reason: the report, of course, as soon as it is published, is made available to them and, in addition, they can pay for it and buy the transcript of the whole of the evidence that is given. I think that it is a tribute to the searching nature of these inquiries, which, in turn, is a tribute to the board and to the counsel who is representing the general public and is presenting all the evidence in the general interests, that these are nothing but whitewashing inquiries. They are thorough, and I cannot really believe that counsel who appear or who might appear for passengers is likely to add anything really to the deliberations, and, of course, most of the time he has neither the money or facilities available to him of technical advise. However that may be, the fact in my experience is that they are seldom there, and if they are there, they are usually only there in a watching capacity.

As I explained, aeronautics is a matter for the Dominion government. The board of inquiry, therefore, is convened by the Dominion government, and that means that the member or members of any bar of any province of Canada has the right of audience. It doesn't matter where the board of inquiry is held. It may be held in Montreal, and the members of the bars of British Columbia, Alberta, Ontario, what have you, have the absolute right to appear there because this is a Dominion board of inquiry.

The procedure at these inquiries is this: apart from the notice convening the board,

and the list of questions, there aren't any pleadings, and you don't know in advance what issues may arise. That is the theoretical position. It doesn't really work out that way for various reasons. One of the reasons is that the teams who have been fact gathering usually contain some members, some employees, of the airlines who are working for the airlines. They usually, sometimes, also include the manufacturers, so that you usually can get some pretty good idea of what the important issues are going to be.

Likewise, the counsel appearing in the general interests will, as a rule, give you in advance a general indication of the important matters so that you can prepare yourself to deal with them. When you get to the public inquiry, itself, the counsel appearing in the public interests calls all of the evidence. He calls every conceivable witness and puts in all the relevant documents, examines the witness, and can cross-examine him, even though it is his own witness. Counsel for the interested parties then in turn cross-examine, and finally they are re-examined and at the conclusion of all the evidence, then the counsel address the board, submit their arguments, and the board considers its findings. The board brings down the written report which is made available to the parties on exactly the same day as it is forwarded to the minister. Personally, I think that it is a very satisfactory method of inquiring into major airline accidents. I don't know myself of any substitution for well-proven method of examination, cross-examination and the right to recall rebutting evidence.

Now, finally, as my skeleton says, "And in conclusion." How does a public inquiry fix liability, if it does fix it?

Well, again, it is a typical Anglo-Saxon compromise, I suppose. In theory, it doesn't fix civil liability at all. But, in practice, we find that it does. The report of the board is not evidence in subsequent civil litigation, but nevertheless, because the interested parties have had the opportunity of being there, because they have had the opportunity of cross-examining the witnesses, because they have had the opportunity of calling the rebutting evidence, then I think that they are usually satisfied that they are not likely to get a substantially different result from a civil court from what they have already got from the board of inquiry.

So, in my experience, what usually happens is that the board of inquiry, although it hasn't a theory in fact, it settles civil liability, and we usually proceed to adjust the claims on the basis of the board of inquiry.

In conclusion — I said conclusion once before, but this really is the conclusion now, I hope, public inquiries are, of course, far too expensive to be used for any and every accident. But, in my personal opinion, I cannot think of any better procedure for handling the major airline inquiries, and I myself have a deep seated distrust for the method of investigation of officials or technical experts without submitting them to cross-examination. The best one in the world may have a preconceived idea and he may tend perhaps to exaggerate in his own mind certain aspects, minimize certain others, in order to square it with his opinion. There is that danger. I don't think it can be denied, and that is why I like the public inquiry, because if any of the technical experts tend that way, that can be corrected. You can cross-examine. You can see that other technical evidence is called, and then you will have a highly competent, qualified board finally to arrive at the answer.

I have had personal experience of a case where, if there had not been a public inquiry, I have no doubt whatsoever that the result would have been written down to the major accident having been due to loss of fuel, when it was nothing of the sort in that particular incident. An elaborate case had been built up on insufficient interrogation of witnesses, and when we got to the board of inquiry, I was able, by cross-examination, to establish beyond a doubt that the witness, on which the whole of this theory had been built, had seen another aircraft altogether. The board of inquiry found, and I think rightly found, that the accident in that case was due to very violent and unforeseen turbulence, so, I confess, that I am sold on public inquiries.

As Baron Velos sings in the opera, "*Chacun a són gout*," which those of you who don't come from the province of Quebec wouldn't have understood what I said anyway, but my taste personally is public inquiries.

Now, if anybody is interested after these proceedings are over, I have with me two reports, one in Canada and one in the United Kingdom, so if anybody would like to see the kind of report which these inquiries make, I would be happy to show you.

May I thank you very much for your amenities. It has been a very great honor to come here and speak to such a distinguished audience of insurance counsel. Thank you. (Applause.)

CHAIRMAN WHITEHEAD: Thank you, very much Mr. "Able Roger" Paterson.

As anchor man, we will call upon another member of the Association, Edward D. Crocker. He is going to talk on the subject of demonstrative evidence and all of the techniques related to the trial of aviation cases. Here, again, we are attempting to illustrate that useful techniques and imaginative ideas are not bound to any one factual situation.

Mr. Crocker gained his aviation experience with the Naval Aviation Cadet program. He served as a naval aviator in World War II, returning to Cleveland to engage in the practice of law in 1945, upon the completion of his tour of duty.

In the discussion yesterday when Mr. Bakke was talking about accidents involving new equipment, he did not mention the problems relating to the Martin 202 aircraft. Mr. Crocker and his associates defended the Martin Company against Northwest Airlines, which was represented by the late Marvin Harrison, in a tremendous liability battle arising out of alleged design failure affecting the structural integrity of the wings of this airplane.

It gives me a great deal of pleasure to introduce to you our member from Cleveland, Edward D. Crocker.

New Fields for Demonstrative Evidence

EDWARD D. CROCKER
Cleveland, Ohio

THE LAWYERS that are here will understand what is meant by the term "demonstrative evidence". For the benefit of some of the ladies who might not understand that term, however, an example is probably in order.

If you ladies and gentlemen were members of the jury in an action in which the Hawaiian hula were an issue, I might appear before you as a witness, take the witness stand and describe the costume that is worn, the grass skirt, the lei and the rest of it; paint a vivid word picture for you of the graceful motions of the hands and the gyrations that go with it. Some of you who had never seen the hula before might understand what I was talking about, but it is likely you would all have different mental images of the hula. That would be testimonial evidence.

But if Hilo Hattie and her troupe were brought here to put on a demonstration for you, you would understand perfectly what the hula was. That would be demonstrative evidence.

I am delighted to appear here and discuss with you the subject of demonstrative evidence. The fact that I am here is a sign of changing times, because a few years ago any lawyer who undertook to get up before a group of insurance counsel and speak to them on the subject of demonstrative evidence would have run the risk of being read right out of the fraternity.

The very words "demonstrative evidence" called to mind a picture of grisly color photographs of blood and gore, a court room blackboard with a NACCA lawyer standing before it with a piece of chalk, multiplying for the benefit of a philanthropically inclined jury thirty years of pain and suffering by the very reasonable rate, he would say, of only $10 a day. Because this type of demonstrative evidence became so prevalent, conservatively minded courts tended to exclude its use. They said it would inflame and prejudice the jury.

You need only glance at the literature on demonstrative evidence published as recently as five or six years ago to see that the articles then being written advocating the use of demonstrative evidence were authored by Belli, Nichols, Dooly, and the rest of the NACCA crowd, while others were writing articles entitled, "Demonstrative Evidence—A Grandstand Play."*

Today, however, the whole conception of demonstrative evidence is changing. Courts generally have adopted the view that although demonstrative evidence that serves no purpose except to inflame and prejudice the jury or to mislead and confuse them will not be permitted, courts will receive and will receive readily demonstrative evidence if they can be convinced that it will help the jury and the judge himself understand what the facts are.

I want to lay before you the thought that demonstrative evidence, properly used, can be of even greater benefit to the defense than it can be to the plaintiff.

Why? Because to the extent that the evidence is confusing, vague, indefinite and uncertain, it helps the plaintiff, not the defendant. The plaintiff whose evidence is vague and uncertain is going to have the benefit of a sympathetic jury who will resolve all vagueness and indefiniteness in his favor.

On the other hand, the defense, to be successful, must be concrete, definite, certain and specific, and that is the role of demonstrative evidence.

Demonstrative evidence not only helps a jury understand facts, but because of its very nature it helps juries understand facts the way you want them to be understood. We all recognize that facts can be understood in different ways, depending upon the manner in which they are presented.

There is the case of the eminent plaintiff's personal injury lawyer, who had grown so successful that he found it necessary to take on a young man, Snavely, to help him prepare his cases. The usual custom was for Snavely to get in touch with the witnesses, talk with the client, get the case ready to go to court and at the last minute the great man himself would take over and try the case.

*42 Ill. B. J. 72 (1953)

On this particular occasion, he had a pedestrian crosswalk case and, as was the usual custom, Snavely prepared the case for trial. On the day the case was to go to court, the lawyer himself called his client in for a brief conference before they went down to the court house. After a few preliminaries he said, "Well, now, tell me, sir, in your own words just what happened." The client replied, "Well, I was cutting across the street down by the corner of South and Vine when this car came along and knocked me down, and I skinned my elbow."

The lawyer transfixed him with a look of horror. "Heavens, man, that's not the way I understand the facts. Mr. Snavely has looked into this matter with the very greatest care. He has interviewed many witnesses. He has talked with you at length and I have been told by Mr. Snavely that you were out shopping for groceries for your six hungry children, and you had to cross the street to reach the grocery store. So you proceeded down to the intersection where there was a crosswalk, and after looking in all directions to be sure that there were no vehicles approaching, you proceeded carefully into the intersection. After you were well out into the crosswalk, this big, black Cadillac car came roaring down the street going at least 60 miles an hour. The driver slammed on his brakes, swerved and struck you violently, hurling you with great force to the pavement. And while it is true you didn't miss any time from work, nevertheless, the injuries were extremely painful and aggravating."

About that time, the client was beginning to get the drift of things and said: "Yes, yes. That's right. That's the way it happened."

"Good Heavens, man, don't withhold evidence like that from your own lawyer."

So the way in which evidence is presented does make a difference.

Where are you going to use demonstrative evidence in the trial of a lawsuit? I have not yet found an occasion to use it in the voir dire but, at every other stage of the trial, I recommend that you seriously consider the use of demonstrative evidence.

In your opening statement you have the first opportunity to get your side of the case across to the jury. Their minds are fresh and open. They don't know very much about the case yet. If you represent a defendant, the opening statement is a particularly valuable opportunity to get your side of the case implanted in the minds of the jurors. If the jury finds out about the case for the first time during the plaintiff's evidence, you are going to be seriously prejudiced. Their minds may be so closed that by the time you get around to putting on your case, you won't have a chance of convincing them what the facts are.

So, at the very outset of the case, you should make liberal use of demonstrative evidence to help the jury understand what the case is about. If you have maps that show how the accident happened, if you have photographs that are illustrative, get them out before the jury and use them. Most courts are quite liberal in permitting the use of demonstrative evidence in opening statements, provided you can convince them you are not trying to inflame of prejudice the jury, but that you want to help them understand the facts.

It is often helpful to prepare large cardboard lettered cards with an outline of the various points to be made in the opening statement.

In one recent action, for example, we had cards made up in letters large enough that the jury could read them readily from the jury box. One of them read, "Plaintiff was negligent because, 1," and then a statement of the first reason; "2," a statement of the second reason, and so on down. Another card read, "The defendant exercised proper care because:" and then a brief statement of the points that we wanted to make on that phase of the case. Other issues in the case were covered by similar lettered cards.

Such cards are used in connection with the opening statement. They do not have any place in the presentation of the evidence. At the end of the trial, when you come to argue the case to the jury, you get out the cards again and remind the jury of their use in opening statement. Tell the jury you want to review with them the evidence that has been adduced during the trial so that they may see what facts have been established.

Take up the first point: "The defendant exercised proper care, because: 1." Summarize the evidence on that point and pass on to the second. The jury can follow what you are talking about. They know you are not just rambling along haphazardly. They know you are approaching the evidence in an organized way. They understand where you are going and where you stand in your argument.

Earlier this morning, Mr. Paterson referred to abbreviations such as V.F.R., I.F.R., etc. It is helpful at the very outset to prepare another chart with abbreviations explained on it. Most courts will permit such a chart to remain before the jury during opening statements and even during presentation of the evidence as an aid to both court and jury in understanding the abbreviations that invariably creep into the testimony in an aviation trial.

In an aviation case or any other case where technical or unfamiliar terms will be widely used, a glossary may be very valuable when used in the same manner. In fact, many courts will insist that something be done to explain such terms to the jury.

Following the opening statement, you will want to make use of demonstrative evidence in connection with the presentation of your own case. Not only will demonstrative evidence help the jury understand the facts as you want them understood but, in some cases, it may be invaluable to your own witnesses.

We had a case not long ago that involved, as an important part of the evidence, a very complex chemical process. The chemists for the defendant had worked the thing out, of course, and it was all very clearly laid out by them. We needed an expert witness, however, an impartial expert witness. So we went to one of the leading universities and secured the services of the head of the department. He was an extremely impressive and distinguished man. He was able to take the matter that was laid out before him and explain it clearly and in a most convincing manner. It was not until we were just about ready to put him on the stand that we discovered that when he did not have the outline of the process in front of him, he was inclined to become confused and couldn't keep the process straight.

We were understandably quite disturbed. It was too late to get anyone else. Yet the witness could not be put on the stand unaided.

To solve the problem, we prepared a chart in various colors, containing in symbolic style all of the steps of the chemical process illustrated on the chart. When it came time to put the witness on the stand, the chart was set up and the witness used it to explain the process. It not only helped the jury understand what the witness was talking about, but it helped him keep the process straight. Then, during his cross-examination, whenever he was asked a question about the process, he would refer to the chart and explain to the jury again just how it worked. The cross-examining lawyer never did realize that if he had turned the chart to the wall and asked the witness a few questions, he would almost certainly have put his foot in his mouth.

Thus it is important that you impress upon your witnesses the thought that when they are cross-examined, they try to make use of the demonstrative evidence that has been prepared for their direct examination. Very frequently, a witness can make absolutely devastating use of a chart, map, photograph, or other item of demonstrative evidence in the course of his cross-examination. Conversely you must be extremely wary when you cross-examine an opposing witness who has made use of demonstrative evidence. If there is some way you can turn that evidence back on him, or use it to establish some point of your own it could be very helpful. But you want to make absolutely certain you know what you are doing, because the witness may very well be able to use the demonstrative evidence to sew his case up airtight.

In the closing argument, demonstrative evidence comes into its full use. There, you can review what the witnesses have said, pointing out how the demonstrative evidence backs up their testimony in the way you want it understood. You can refer again to the outline of argument, and it is helpful to put the various exhibits up before the jury where they can see them as you proceed with your argument.

Demonstrative evidence is also particularly persuasive when used in the appellate courts. If the evidence is of assistance to the jury and the trial judge in understanding the facts, it is bound to help the appellate court where there is any kind of factual question.

There is not much question about appellate courts permitting the use of such evidence during the oral argument where it has been a part of the evidence at the trial. We recently had a case, however, in the Supreme Court of Ohio, where it appeared that it would assist the court in understanding the evidence if a chart were prepared, showing the courses of two airplanes that eventually collided, resulting in a catastrophe. To try to describe what the witnesses had said about the paths of approach of these two airplanes would be

extremely difficult in the time alotted, so we prepared a large chart, showing in different colors the paths that the airplanes took. I was a bit dubious as to whether the Supreme Court would permit it to be used, since it was not a part of the record. But not only did the court permit the chart to be used, but two of the judges later remarked that they thought the chart had been particularly helpful in understanding the facts. Thus even the fact that demonstrative evidence has not been used in the trial court should not prevent your making use of it in the appellate courts if the occasion is appropriate.

I would like now to turn to some different types of demonstrative evidence that you may find useful in the trial of aviation cases, that being the subject of the discussion today.

It is almost inconceivable that an aviation lawsuit be tried without a model airplane of the type involved in the case. Such a model is most useful not only to illustrate the attitude or position of the plane in question, but also to familiarize the jury with the various parts of the plane.

If in the trial of a street corner collision case you talk about the left front fender of the plaintiff's car, the jury has no difficulty picturing what you are talking about. But, if you start talking about the left elevator of the plane or the right aileron, the jury is not likely to have the foggiest notion of what you are speaking. If you have a model airplane, however, you not only can hold the attention of the jury, but you can use it to illustrate the parts of the plane to which reference may be made and to explain how the plane banked, how it turned and how it approached for a landing.

Where do you get such a model airplane? Almost all airlines have various models of their planes for display purposes, and you can usually get one of them from the airline for use in court. If you have a case where someone has fallen in the interior of a plane, they may even have a cutaway model with plexiglass sides so you can see the seats and the arrangement of the interior of the plane. If you don't have access to such a model, all of the hobby shops have plastic kits which you can buy and build your own model. If you haven't the time for that type of thing, you can usually get one of the employees of the model shop to build the plane for you.

Maps usually become important in most aviation cases because of the need to locate the position of the plane at various times and plot the course the plane has taken. There are official maps published by the government of the United States that you can obtain and you will probably want to have them present in court because they have an impressive, official look. But most jurors aren't going to be able to read such maps because they have so much detailed information on them. Hence, if a map is important in your case, in addition to the official map with all of the details on it you may wish to prepare a very simple skeleton outline map on one of the large cardboards. It should contain only the most essential information so that it is kept as simple and uncluttered as possible. It is often effective to have one or more of the witnesses mark in additional details in the course of their testimony to give the map a personal touch.

One type of device that may be helpful, depending on the type of case you have, is the magnetic board. Some of you may be familiar with the magnetic board as it is used in automobile cases. It is a steel board with accompanying model automobiles, traffic lights, trucks, trains, and other such objects, all of which have permanent magnets on the bottom. You can place them on the steel board and the magnets will hold them in the position you place them. One side of the board has street intersections of various shapes painted on it, and the other side is a blackboard. Both sides may be helpful for presenting evidence in automobile cases. But the same type of board can also be extremely useful in aviation lawsuits.

The chances are you will probably have to prepare a special board to fit the particular needs of the case. Simply cement some light gauge sheet metal to a plywood board. You can then paint on it whatever map or diagram you want. If the accident occurred at an airport you can paint the runways on the board, add models of the buildings, trees, high tension wires or whatever may be needed. It is essential, however, that you keep it all to scale. Consequently you may want to have the board prepared by or with the assistance of your surveyor.

When you have finished the board, take the magnets out of the cars that come with the magnetic board set and put them in small model airplanes which can be pur-

chased at any dime store. Then the model airplanes can be placed anywhere you want on the board.

The advantage of this arises when you have a witness you are trying to get to describe where the airplane was at a particular time when he observed it. Such a witness can often be very vague and indefinite. When you get through with his examination you have no idea where the airplane actually was. You may hand the witness a piece of paper and ask him to draw an outline of the airport and the location of the plane. When the witness gets through drawing, however, the chances are you won't have any idea where the plane was or what the airport looked like. But if you have a surveyor's plat of the airport on a magnetic board, and hand the witness a model airplane and request him to place it on the board in the position where he saw it, the chances are that you will be able to pin him down to an exact location of the plane. You can then draw a circle around the model to preserve its location for the record.

A similar sort of magnetic board can also be used to illustrate a mechanical device. Several years ago a claim was made that a mechanism in an aircraft engine had been improperly assembled, as a result of which there was an engine failure necessitating a forced landing which ended disasterously. The actual mechanism itself was not helpful in understanding the problem because when it was all assembled, you could not see what was on the inside. So we made a large chart showing the basic outline of the various parts that went into the assembly of the mechanism. The individual parts were cut out of heavy cardboard in different colors for easy recognition. Then small magnets were fixed to the back of the large chart and little tin plates fixed to the backs of the cardboard parts. The parts would then stick to the chart when placed on it. It was thus possible to go through the entire process of assembling this aircraft component so that the jury could see just where each part was in relation to the others. When it was fully assembled it was extremely helpful in understanding the points we wanted to establish.

Aerial photographs can be very useful in an aviation lawsuit and in other types of cases as well. Many governmental agencies make such aerial photographs. The Department of Commerce, the Department of Agriculture, and frequently state and local governments make such aerial photographs for various purposes. If you have a case, for example, where a highway has been changed since the time of the accident, it may pay you to check with some of the governmental authorities that make these aerial photographs. You may be fortunate enough to find a photograph taken before the change was made.

In a group of cases arising out of a large explosion at South Amboy, New Jersey, the entire area had been wiped out by the blast. Some twelve box cars full of high explosives blew up, so it was impossible to reconstruct the area. We checked with the Department of Agriculture, however, and found out that just a year before the explosion, they had taken aerial photographs of the city. We had an enlargement made four feet square, and in that enlargement we found a square of five or six inches which showed just exactly the area we wanted. We had that part enlarged to four feet square, and we had a perfect picture of the area as it was immediately before the explosion. It was so accurate that very detailed measurements could be taken from it.

Such aerial photographs are often used in aviation cases, for witnesses can easily orient themselves to the photographs and use them to locate their own positions, the path taken by the plane, the position of the wreckage and similar matters.

In most aviation cases weather plays an important part in one way or another. You will find that the official hourly sequence weather reports are almost incomprehensible to a jury. You need to have the official reports present in court because of their air of authenticity, but you cannot present them to the jury without a complete translation of the hieroglyphics used in these official weather reports. It is well to put such translation on a large cardboard so the jurors can all see it as the weather is being explained.

You will often get a great deal of help from manuals that manufacturers of aircraft put out which illustrate the operation of the fuel system and all sorts of other systems and mechanisms on the airplanes. If you have a case involving a particular airplane, get a manual for that specific plane. You will find there are simplified illustrations in most such manuals which can be enlarged and used in the presentation of evidence.

Maritime Torts Resulting in Death in State Territorial Waters: The Skovgaard and Halecki Cases

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IN ANY DISCUSSION concerning the law involved in suits brought for the death of maritime workers where the injury resulting in death occurs in state territorial waters, it is imperative to realize at the outset that neither the common law nor the civil law gives a cause of action for death, except where provided by statute.[1] This article is a discussion of some of the problems arising where the survivors of a maritime worker, usually a long-shoreman, who was an employee of an independent contractor not of the vessel, seek recovery for the death of the decedent under the provisions of a state wrongful death act. In these cases the state acts afford the only basis on which the decedent's survivors can assert a cause of action for wrongful death. The Jones Act[2] is not applicable because the maritime workers under consideration herein are not employees of the vessel. The Death on the High Seas Act[3] affords no basis for relief because that act specifically provides that the act causing the death must occur beyond a marine league from the shore of any state in order for that statute to be applicable. In cases of this type, two fundamental, but clearly distinct, questions are presented:

(1) Whether "unseaworthiness" is a "wrongful act, neglect or default" under the particular state death act involved, thus affording a basis for recovery.

(2) Whether contributory negligence on the part of the decedent is an absolute bar to recovery or serves merely to mitigate damages under the admiralty doctrine of comparative negligence.

On February 24, 1959, the United States Supreme Court in *The Tungus v. Skovgaard*[4] and *United and N.Y. and N.J.S.H. Pilots Asso. v. Halecki*[5] cases handed down the most recent pronouncement by the Supreme Court concerning the rights and liabilities of vessel owners in connection with suits for death of maritime workers brought under the provisions of a state death act, where the injury resulting in death occurred in the state's territoral waters.

In the *Skovgaard* case, the decedent was a maintenance foreman employed by an independent contractor who had been hired by the owner of the cargo, not the vessel, to unload a cargo of coconut oil. He was killed when he slipped and fell into a tank of heated coconut oil aboard the vessel, *The M/V Tungus*. Suit was brought in the United States District Court, District of New Jersey, by the decedent's administratrix and was tried before the court without a jury. According to the trial court, the plaintiff alleged two separate and distinct grounds of recovery: one under the New Jersey Wrongful Death Act for negligence, and the other under the general maritime law on the basis of unseaworthiness of the vessel.[6] The trial court held that since the general maritime law did not allow a recovery for wrongful death, the administratrix had no cause of action against the vessel or its owner based on unseaworthiness. The trial court further held that the vessel owner was not liable to the plaintiff on the basis of the New Jersey Wrongful Death Statute because there was insufficient proof of any negligence on the part of the vessel.

The Court of Appeals for the Third Circuit, sitting en banc, by a 4-3 decision re-

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[1] 25 C. J. S. Sec. 13 and the numberous authorities cited under footnote 69.

[2] 46 U. S. C. A., Sec. 688.

[3] 46 U. S .C. A., Sec. 761.

[4] 358 U. S. 588, 3 L.Ed. 2d 524, 79 S. Ct. 503 (1959).

[5] 358 U. S. 613, 3 L.Ed. 2d 541, 79 S. Ct. 517 (1959).

[6] 141 F. Supp. 656.

versed the trial court and held that the New Jersey Wrongful Death Act embraced a claim for unseaworthiness and that there was sufficient proof of negligence in order to warrant entry of a judgment in favor of the plaintiff on that basis.[7] It is interesting to note that the Third Circuit blended the two grounds of recovery asserted by the plaintiff in the trial court and determined that plaintiff was in fact asserting unseaworthiness as an independent ground of recovery under the New Jersey Wrongful Death Act, rather than an independent ground of recovery under the general maritime law.[8] The United States Supreme Court granted certiorari and affirmed the judgment of the Third Circuit. The opinion for the court, written by Mr. Justice Stewart with four justices concurring,[9] may be summarized as follows:

(1) It is an established principle of maritime law that in the absence of statute there is no cause of action for wrongful death, citing *The Harrisburg*[10] and other authorities.

(2) The plaintiff's right to recover in the case depended entirely upon the New Jersey Wrongful Death Statute.

(3) When an admiralty court adopts a state's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached, again citing *The Harrisburg*[11] and other authorities.

(4) When admiralty courts are used to protect rights rooted in state law, said courts try to determine the issues in accordance with the substantive law of the state, citing *Garrett v. Moore-McCormick Company.*[12]

(5) The New Jersey courts have not spoken upon the question of whether in such case the maritime law or the common law is applicable under the New Jersey Wrongful Death Act, and in view of that fact the Court could not conclude that the interpretation given to the New Jersey Death Statute by the Third Circuit was clearly wrong.

It is significant to note that the trial court, Third Circuit and U. S. Supreme Court all failed to pass on the question of what defenses would be available and the nature and extent of such defenses.

Mr. Justice Brennan, joined by three members of the court,[13] wrote a separate opinion concurring in part and dissenting in part. They concurred in the court's affirmance of the Third Circuit's action, but regarded the question as clearly one of federal law with the state death acts serving the function of providing a vehicle for the enforcement of what they regarded as a federal right.[14]

> *"While the course of development of the common law has brought it about that this remedy has always been embodied in a statutory enactment,* the existence of such a remedy is now a basic premise of the law of torts administered throughout the country. And with the Death on the High Seas Act and the State Statutes, the Federal Admiralty Law has available *a remedy to fashion* for the fatal breach of a maritime duty anywhere within its jurisdiction."

In a companion case, *Halecki v. United New York and New Jersey Sandy Hook Pilot's Asso.*,[15] the plaintiff sought recovery, again under the provisions of the New Jersey Death Act, alleging negligence of the defendants and unseaworthiness of the pilot boat on which the decedent was employed by a subcontractor engaged by a ship repairyard to clean the engine room of the ship. The decedent was using carbon tetrachloride to clean the generators of the vessel and was killed, apparently as a result of the density of tetrachloride fumes and inadequate ventilation.

The trial court opinion was not reported, but the opinion of the Second Circuit indicates that the case was submitted to the jury on the basis that either negligence or unseaworthiness would suffice as a primary ground of liability, and that any contributory negligence on the part of decedent would go to diminish damages under a com-

[7] 252 F. 2d 14 (1959).
[8] 252 F. 2d 17 (1959).
[9] Mr. Justice Clark, Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Whittaker.
[10] 119 U. S. 199, 30 L. Ed. 358 (1886).
[11] 119 U. S. 199, 30 L. Ed. 358 (1886).
[12] 317 U. S. 239, 245, 87 L. Ed. 239, 243, 63 S. Ct. 246 (1942).
[13] Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas.
[14] 358 U. S. 588, 3 L. Ed. 2d 528, 79 S. Ct. 503 (1959).
[15] 358 U. S. 613, 3 L. Ed. 2d 541, 79 S. Ct. 517 (1959).

parative negligence standard rather than act as an absolute bar to recovery.

The trial court entered judgment in favor of the plaintiff on the jury verdict.

On appeal the Second Circuit affirmed, holding that unseaworthiness was encompassed within the words "neglect" and "default" as contained in the New Jersey Wrongful Death Act.[16] Relying heavily on dictum by the Supreme Court of the United States in *Pope & Talbot v. Hawn*,[17] and the decision of the Third Circuit in the *Skovgaard*[18] case, the court also held that the New Jersey act incorporated the maritime standard of comparative negligence. The Supreme Court of the United States in a 5-4 decision[19] reiterated the position taken in the *Skovgaard* case, that the plaintiff's right in the suit depended entirely upon the applicable state statute, but that absent a decision on the question by the courts of the state of New Jersey the findings of the lower court would not be disturbed. However, the court reversed the Second Circuit and held that the plaintiff's decedent was not within that class of maritime workers entitled to the protection of the doctrine of unseaworthiness. The court stated that the work performed by the decedent was entirely foreign to that ordinarily performed by the ship's crew, and pointed to the fact that the decedent could only perform his work at a time when all members of the crew were off the ship.

The Supreme Court in reversing both the trial court and Second Circuit Court of Appeals remanded the case for a new trial since there was no way to know under the charge given to the jury whether the jury's finding of liability was based solely on unseaworthiness or on negligence since the issues had been submitted conjunctively to the jury. The dissenting opinion followed the same reasoning announced in the *Skovgaard* case by the dissenting justices.

[16] 251 F. 2d 708 (1958).

[17] 346 U.S. 404, 409-410, 98 L. Ed. 143, 151, 74 S.Ct. 201, 205, (1953): "His right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even if Hawn were seeking to enforce a state created remedy for this right, Federal Maritime Law would be controlling."

[18] 252 F.2d 17 (1958).

[19] Mr. Justice Stewart wrote the opinion of the court and the opinion was concurred with by Mr. Justice Clark, Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Whittaker. Mr. Justice Brennen wrote the dissenting opinion and he was joined by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas.

It is important to note that the disposition of the *Halecki* case by the Supreme Court did not require the court to address itself to a determination of the nature and extent of the defenses available to a shipowner in connection with such actions.

In the *Skovgaard* and *Halecki* cases the court, by a narrow majority, has reaffirmed the doctrine announced in the landmark decision of the *The Harrisburg* and in numerous cases subsequent to that opinion[20] that in utilizing a state death act in connection with a suit for death arising out of maritime employment the state death act must be accepted *in toto* by the litigants, including whatever conditions and limitations the enacting state has established.

In view of the approach taken by the Supreme Court in the cases under discussion, it becomes imperative for the litigants in cases of this nature to look to the death act of the state in the territorial waters of which the maritime tort occurred to determine the scope of their rights and the nature of their defenses. Thus it is imperative to consider generally the death acts of the various states, and the pertinent decisions under those acts by both state and federal courts in connection with maritime torts resulting in the death.

General Provisions of State Death Acts

The statutes of the various states fall into two distinct categories, the so-called "survival statutes" and the "death acts". The discussion herein is directed primarily toward the death act type of statute although the same considerations might well be pertinent in connection with survival statutes. The substantive provisions of nearly all state death acts are patterned after and in many cases identical with the provi-

[20] *The HAMILTON*, 207 U.S. 398, 52 L. Ed. 264, 28 S.Ct. 133 (1907); *The LaBOURGOGNE*, 210 U.S. 95, 52 L.Ed. 973, 28 S.Ct. 664 (1908); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 66 L.Ed. 210, 42 S.Ct. 89 (1921); *Levinson v. Deupree*, 345 U.S. 648, 97 L. Ed. 1319, 73 S.Ct., 914 (1953); *Just v. Chambers*, 312 U.S. 383, 85 L.Ed. 903, 61 S.Ct. 687 (1911); and the following representative lower court decisions: *Continental Cas. Co. v. The BENNY SKOU*, 200 F.2d 246, 4 Cir. (1952); *Graham v. A. Lusi, Ltd.*, 206 F.2d 223, 5 Cir. (1953); *Lee v. Pure Oil Co.*, 218 F.2d 711, 6 Cir. (1955); *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902, 3 Cir. (1939); *Curtis v. Garcia*, 241 F.2d 30, 3 Cir., (1957); *O'Brien v. Luckenbach S.S. Co.*, 293 F.170, 2 Cir. (1923); *Truelson v. Whitney & Bodden Ship Co., Inc.*, 10 F.2d 412, 5 Cir., (1926), certiorari denied 271 U.S. 661, 70 L.Ed. 1138, 46 S.Ct. 474 (1926).

sions of the original Lord Campbell's Act.[21] By and large they adopt the Lord Campbell's Act language in providing a cause of action when the death of a person is caused by the "wrongful act, neglect, or default" and in further stating that the "wrongful act, neglect or default must be such as would if death had not ensued" have entitled the party injured to maintain an action to recover damages.

(1) *Unseaworthiness as a Primary Ground of Liability*

Most state death acts were passed during the latter half of the nineteenth century, primarily during the years 1860 through 1900. It is significant to note that the doctrine of unseaworthiness as applied to seamen who are actually members of the crew was not established in this country until the decision in *The Osceola* [22] in 1903. It seems clear from the opinion of the Supreme Court in THE OSCEOLA that unseaworthiness is a liability without fault doctrine, but any doubts on that score have been clearly dispelled by the decisions of the Supreme Court in *Alaska Steamship Company, Inc. v. Petterson,* [23] and *Rogers v. U. S. Lines.*[24] Although the doctrine of unseaworthiness was established insofar as members of the crew are concerned in *The Osceola* in 1903, it was not until 1946 in *Seas Shipping Company, Inc. v. Sieracki,* [25] that the court extended the seamen's warranty of seaworthiness to encompass longshoremen. Later in *Pope & Talbot, Inc. v. Hawn*[26] the court for the first time encompassed within the protection of the unseaworthiness concept a maritime employee other than a longshoreman.

It has long been an accepted principle of statutory construction that in interpreting the intent that the legislature attached to particular language embodied in a statute, that language must be construed in accordance with its meaning at the time that the statute was enacted rather than at some subsequent time. [27] An adherence to this well accepted principle would clearly dictate that unseaworthiness is not a "wrongful act, neglect or default" within the purview of the state death statutes in view of the fact that these statutes were enacted prior to the evolution of the unseaworthiness doctrine in *The Osceola* case and its subsequent expansion in the *Sieracki* and *Pope & Talbot* opinions.

In considering whether or not the concept of unseaworthiness can be "wrongful act, neglect or default" under a particular state death statute, it is imperative to bear in mind the definition of the doctrine announced by the Supreme Court in the *Sieracki* case: [28]

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the services imposes, *the liability is neither limited by conceptions of negligence nor contractual in character* (citations omitted.) *It is a form of absolute duty owing to all within the range of its humanitarian policy.*"

What a court must really do to read unseaworthiness into a state death act is to hold that a concept "neither limited by conceptions of negligence or contractual in character" is encompassed by the terminology "wrongfull act, neglect or default". While these terms have not been defined with precision in the cases, there is authority for the proposition that the term "wrongful act" is intended primarily to cover cases where the act was wantonly or intentionally

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[21] *LORD CAMPBELL'S ACT* 9 and 10 Victoria, Chap. 93, pp. 531-532 (1846) "Whereas no action at law is now maintainable against the person who by his *wrongful act, neglect, or default* may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore, enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lord's spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, *that whensoever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof,* then, and in every case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

[22] 189 U.S. 158, 23 S.Ct. 83 (1903).

[23] 347 U.S. 396, 98 L.Ed. 798, 74 S.Ct. 601 (1954).

[24] 347 U.S. 984, 98 L.Ed. 1120, 74 S.Ct. 849 (1954).

[25] 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946).

[26] 346 U.S. 406, 94 L.Ed. 143, 74 S.Ct. 202 (1953).

[27] 50 Am. Jur. p. 224, Sec. 236, and authorities cited under Footnotes 10 and 11; 82 C.J.S. p. 638, Sec. 329b, and authorities cited under Footnote 11.

[28] 328 U.S. 85, 94, 95; 90 L.Ed. 1099, 1106; 66 S.Ct. 812 (1946).

committed.[29] "Neglect" obviously covers recoveries sought on a negligence basis. The term "default" is sometimes defined as an omission or failure to perform a legal duty, but is generally utilized in connection with the failure to perform some contractual obligation.[30] It is clear that the conduct complained of must be tortious in nature and that a mere breach of contract will not support a recovery under the applicable statute.[31] There is authority that a breach of an implied warranty of the fitness of food for human consumption is either a "wrongful act" or "default" within the purview of a state death statute.[32] There is strong support for a contrary position on the basis that such an action sounds in contract, and the particular statutes involved afford relief only for tortious conduct resulting in death.[33] It would clearly seem to be a strained construction of the terms "wrongful act," "neglect," or "default" to hold that these terms incorporate within the provisions of a state death statute the admiralty concept of unseaworthiness, and the better reasoned cases are in accord with this view.

In *Graham v. A. Lusi, Ltd.*[34] a longshoreman was killed when a defective link in a topping lift on a cargo boom broke and the boom fell and hit him. The widow of the longshoreman sued in admiralty under the provision of the Florida Death Act.[35] The Fifth Circuit held that a cause of action based on unseaworthiness was clearly not encompassed within the provisions of the Florida Death Act.

In *Mortenson v. Pacific Far East Line*[36] the controversy arose on a motion to dismiss the cause of action. The district court held that where the case dealt with a wrongful death as a result of unseaworthiness, it presented neither a ground of recovery under the California Wrongful Death Statute[37] nor a cause of action under the general maritime law and the cause was accordingly dismissed.

In *Lee v. Pure Oil Company*,[38] the decedent, while walking across several moored barges to deliver bread to a tow boat, fell from one of the barges into the river and drowned. Suit was brought under the provisions of the *Tennessee Death Act*,[39] and the Sixth Circuit held that the general maritime law that gave a right to recover for unseaworthiness did not extend that right to a recovery for wrongful death, and that the statute involved did not provide a cause of action for death based on unseaworthiness but allowed recovery for negligence only.

The Court of Appeals of Louisiana in *Babin v. Lykes Bros. Steamship Company, Inc.*[40] considered a case in which a longshoreman was killed when he fell from the deck of the vessel into the Mississippi River while performing his duties on the vessel. Suit was brought under the provisions of the *Louisiana Death Act*,[41] and the court held that the right to recover under the provisions of that act was governed by the ordinary rules of negligence, and that any maritime cause of action based on unseaworthiness was abated by the death of the decedent.

However, the New York state courts have read unseaworthiness into the provisions of the New York Death Act. In *Clark v. Iceland S.S. Company*,[42] a longshoreman slipped while walking on stowed hatch covers on the ship and fell into the water and drowned. The Supreme Court of New York, Appellate Division, First Department, reversed the trial court judgment for the plaintiff on evidentiary grounds and ordered a new trial, but clearly stated that

[29] *Lewis v. Taylor Coal Co.*, 66 S.W. 1044, 23 Ky. Law Rept. 2218, 2219, 112 Ky. 845, 57 L.R.A. 447 (1902).

[30] Black's Law Dictionary, 4th Edition, p. 505 (1951); Vol. 11, Words and Phrases, Perm. Ed., "Default".

[31] 25 C.J.S. p. 1090, Sec. 23.

[32] *Greco v. S. S. Kresge Co.*, 12 N.E.2d 557, 277 N.Y. 26, 115 A.L.R. 1020 (1938).

[33] *Whiteley v. Webb's City*, 55 So.2d 730, ——— Fla. ——— (1951); *Wadleigh v. Howson*, 189 A. 865, 88 N.H. 365 (1937); *Howson v. Foster Beef Co.* 177 A. 656, 87 N.H. 200 (1935).

[34] 206 F.2d 223, 5 Cir., (1953).

[35] Vol. 21, Fla. Stat. Anno., Sec. 768.01. ". . . wrongful act, negligence, carelessness or default . . . such as would, if death had not ensued. . . ."; see footnote 88 for full text of statute.

[36] 148 F.Supp. 71 (1956).

[37] Cal. Code Civ. Pro. Sec. 377. "When the death . . . is caused by the wrongful act or neglect of another, . . ."

[38] 218 F.2d 711, 6 Cir., (1955).

[39] Vol. 4, Tenn. Code Anno., Sec. 20-607. " . . . The right of action which a person, . . . whose death is caused by the wrongful act, omission, or killing of another, would have had against the wrongdoer, in case death had not ensued. . ."

[40] 94 So.2d 715 (1957).

[41] Vol. 9, La. Civ. Code, Art. 2315. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of . . ." Note that this language does not copy the original Lord Campbell's Act, but apparently is of Civil Law derivation.

[42] 179 N.Y.2d 708 (1958).

unseaworthiness was either a "wrongful act" or "default" within the meaning of the New York State Death Act,[43] relying exclusively on the circuit court opinions in the *Halecki* and *Skovgaard* cases and the opinion of the New York court in *Greco v. S.S. Kresge Company*.[44]

A state court would certainly have additional grounds for refusing to include the strict liability concept of unseaworthiness within its death act where the state had clearly refused to impose liability without fault in connection with other types of controversies.[45]

While it is highly questionable that longshoremen and other similar maritime workers are performing work traditionally performed by seamen,[46] it is suggested that the hazards involved in their occupations do not warrant the imposition of the strict liability concept of unseaworthiness in suits under state death acts against the vessels, in addition to the guaranteed compensation afforded the survivors of maritime workers under the provisions of the Longshoremen's and Harbor Worker's Compensation Act.[47]

Further it should be remembered that the famous "saving to Suitors Clause" of the Judiciary Act of 1789[48] "saved to suitors, in all cases, the right of a *common-law* remedy where the common-law is competent to give it." Unseaworthiness is unknown at the common-law and would clearly not be saved to suitors who invoke the common-law to recover for a maritime tort resulting in death. While the language of this statute was changed somewhat in the 1948 and 1949 revisions of the Judiciary Code[49] the Supreme Court of the United States in *Madruga* v. *Superior Court of California*[50] clearly stated that the change in language was not intended to narrow the jurisdiction of the states under the original 1789 act.[51]

It is the conclusion of the writers that any consideration of the legislative intent of the enacting state, the definition of the terms within the various state statutes, the well-established precedents in this area, and the federal statutes saving "common-law remedies" to suitors will not reasonably support the incorporation of the maritime strict liability doctrine of unseaworthiness into state death statutes.

2. *Contributory Negligence as an Absolute Defense.*

In considering the question of the effect of contributory negligence on the part of decedent in a case of this type, it is important to realize that neither the trial court, the Third Circuit, nor the Supreme Court of the United States passed on the question of defenses in the *Skovgaard* case. While the Second Circuit in the *Halecki* case read comparative negligence into the New Jersey statute, the Supreme Court of the United States never passed on the question but determined that the decedent was not entitled to the protection of the warranty of seaworthiness and remanded the case to the trial court for further proceedings.

Basically the argument by plaintiff's counsel for reading comparative negligence into the death statutes in maritime tort cases is this. As has been mentioned, most of the death acts provide that the plaintiff is entitled to recover if the wrongful act, neglect or default is such as would, *if death had not ensued,* have entitled the party injured (the decedent) to maintain an action to recover damages. Counsel for plaintiffs, relying on the *Sieracki* and *Pope & Talbot* cases, point to the fact that the decedent would have been entitled to the benefits of comparative negligence had he been suing merely for his injuries. They urge that since "if death had not ensued" the decedent would have been entitled to the doctrine of comparative negligence, his survivors should also receive the benefits of that doctrine. The obvious fallacy of this reasoning is that in cases involving fatal injuries the cause of action vested in the statutory beneficiaries does not arise until death occurs. This cause of action is completely independent of any rights held by deceased prior to death under the general

[43] Vol. 13, Decedent's Estate Law, Sec. 130. "For a wrongful act, neglect or default . . . against a natural person . . . or corporation . . . which would have been liable . . . if death had not ensued. . ."

[44] 277 N.Y. 26, 12 N.E.2d 557, 115 A. L. R. 1020 (1938), where the court held that a breach of an implied warranty of the fitness of food for human consumption was either a "wrongful act" or "default" under the New York statute.

[45] Example: *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221, (1936), refusing in a pollution cause to apply the strict liability doctrine as announced in *Rylands v. Fletcher*, L.R. 3 H. L. 330.

[46] *Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381, (1934).

[47] 33 U.S.C.A., Sec. 901, et seq.

[48] 1 Stat. 76.

[49] 28 U.S.C.A. Sec. 1333.

[50] 346 U.S. 556, 560, Note 12, 98 L.Ed. 290, 296, 74 S.Ct. 298, 300 (1954).

[51] Gilmore & Black, The Law of Admiralty, Sec. 1-13, pp. 33-36, (1957).

maritime law and is not to be outlined by the boundaries of the general maritime law. Reference by plaintiff's counsel to the *Sieracki* and *Pope & Talbot* is without avail since both were *injury cases* where both the right to recover and the remedy to effectuate that right were rooted in and governed by the federal maritime law.

In maritime *death cases* decided under the Louisiana, [52] Pennsylvania, [53] Florida, [54] Texas, [55] Ohio, [56] and Kentucky, [57] death acts, the courts have uniformly held that contributory negligence is an absolute bar to recovery.

The fundamental distinction between a cause of action for injuries rooted in the general maritime law and a cause of action for wrongful death wherein the state death statutes alone provide a basis for recovery was clearly enunciated in the case of *Byrd V. Napoleon Avenue Ferry Company*.[58] In the *Byrd* case the decedent and his wife were in an automobile, driven by the decedent, and while debarking from a ferry the automobile fell into a river resulting in the death of the driver-husband and injuries to his wife. She instituted suit asking for damages for her own injuries under the general maritime law and for the death of her husband under the provisions of the Louisiana Death Act.[59] The court found primary negligence but also found negligence on the part of the decedent-husband.

The trial court held that the wife was governed by comparative negligence in her suit to recover for her personal injuries, but that the decedent's contributory negligence barred any right to recovery he might have under the Louisiana Death Act. In discussing the respective rights of the libellant and her husband and the effect of his contributory negligence the court discussed *Pope & Talbot v. Hawn* and other cases in this area as follows:[60]

"In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 Sup. Ct. 202, 205, the Supreme Court settled the question as to which law applies to maritime tort occurring within the borders of the state, at least insofar as cases not arising under State Wrongful Death Statutes are concerned. There the Supreme Court held that since the basis of Hawn's action was a maritime tort, 'a type of action which the Constitution has placed under national power to control,' his right of recovery was rooted in federal maritime law and no state law may deprive him of that right. The issue there was identical with the issue here as to libellant's claim for her own injuries. It is true that in Pope & Talbot, the plaintiff was a ship repairman, whereas libellant was a passenger on a ferry. Nevertheless, the basis of her action, like Hawn's, was maritime tort and there is nothing in Pope & Talbot which would limit its application to maritime tort relating only to ship reparimen. *The doctrine of Pope & Talbot, however, is not broad enough to cover maritime tort where recovery is sought under a state death statute.* No death claim was involved in Pope & Talbot, although much is made by libellant over a statement that in that case relating to state created remedies for maritime tort. That statement is, 'even if Hawn were seeking to enforce a state created remedy for his right, Federal Maritime Law would be controlling.' Libellant, with some support from the First Circuit in O'Leary v. U.S. Lines, 215 Fed. 2d 708, contended that the statement in Pope & Talbot means that even where a state wrongful death statute is used to supplement the general maritime law, the principles of the general maritime law must be applied in determining the right to recover. At first blush, it would seem that the statement in question is subject to libellant's interpretation. However, when read in connection with the language which immediately precedes and follows it in the opinion, it becomes clear that it was not the intention of the writer to indicate that when state death statutes are used to supplement the general maritime law, the principles of the General Maritime Law determine the right to recover thereunder.

"First of all, the statement itself makes a distinction between a right to recover and

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[52] Vol. 9, La.Civ.Code, Art. 2315, see footnote 41.

[53] Vol. 12, Pa.Stat.Anno., Sec. 1601-1604, see footnote 62.

[54] Vol. 21, Fla. Stat.Anno., Sec. 768.01, see footnote 88.

[55] Vol. 13A, Rev.Civ.Stat. of Tex., Art. 4671-4678, see footnote 71.

[56] Title 21, Ohio Rev.Code. Anno., Sec. 2125.01, see footnote 76.

[57] Chap. 411, Ky. Rev. Stat., Sec. 411.130, see footnote 79.

[58] 125 F.Supp. 573 (1954); affirmed per curiam, 5 Cir., 227 F.2d 958, certiorari denied 351 U.S. 925, 100 L.Ed. 1455, 76 S.Ct. 783, (1956).

[59] Vol. 9, La.Civ.Code, Art. 2315, see footnote 41.

[60] 125 F.Supp. p. 577-578.

the remedy to be used in enforcing that right. *The statement contemplates a right rooted in Maritime Law and a state-created remedy to enforce it. The situation here, as to the death claim for the husband, is totally different. Here there is no right to recover under the General Maritime Law.* Where such a void exists, admiralty courts will allow a state statute to fill the void and provide a right of recovery when so to do it is not hostile to the characteristic features of the maritime law, or inconsistent with federal legislation. Western Fuel Company v. Garcia, 257 U.S. 233, 242, 42 Sup.Ct. 89, 66 Law Ed. 210. *Here the very right to recover itself, rooted in State Law, is being used as a supplement to the general maritime law and not as a remedy to enforce a pre-existing right rooted in the general maritime law.* Mr. Justice Black, the author of Pope & Talbot, realized this distinction when he cites as authority for his explanation of the statement in Pope & Talbot, on which libellant relies, the case of Garrett v. Moore-McCormack, 317 U.S. 239, 63 Sup. Ct. 246, 251, in which the court, again with Mr. Justice Black as its organ, distinguishes between a right rooted in the general maritime law and one rooted in the state law. There he sought to show that regardless of the court, federal or state, which supplied the remedy, the system of law in which the right to recover is rooted governs the question of liability. 'The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law (citing Erie Railway Company v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 Law Ed. 1188). And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state.' (Citing Western Fuel Company v. Garcia, supra, in which the court applied to a maritime tort, not only to the State Wrongful Death Statute, but the State Statute of Limitations as well.)

"This excerpt from Mr. Justice Black's opinion in Garrett leaves no doubt that when he said in Pope & Talbot, 'even if Hawn were seeking to enforce a state-created remedy for this right, Federal Maritime Law would be controlling,' he was not referring to a right to recover under a state wrongful death statute. To so interpret such language is to overrule by dictum, not only the import of Mr. Justice Black's own opinion in Garrett, but also the uniform jurisprudence of the Supreme Court and Courts of Appeal.

"It is this court's conclusion, therefore, that the right to recover for maritime tort not involving death and occurring within the borders of a state is governed by the general maritime law, and the *right to recover under a state wrongful death statute for a maritime tort is governed by the law of the* State."

Before leaving the *Byrd* case, two other aspects of that decision seem important. First, it may be argued that the *Byrd* case is unimportant since the Louisiana Death Statute, apparently derived from the civil law, does not contain the Lord Campbell's Act terminology. However, the court's clear and well documented distinction between personal injury cases and death cases would apply to any maritime tort resulting in death, and the reasoning of the case clearly shows that there is no real precedent for the incorporation of any maritime concepts into the state wrongful death acts. Second, it is important to note that the trial court opinion in the *Byrd* case was affirmed per curiam by the Fifth Circuit and that certiorari was denied by the Supreme Court. While the Supreme Court has stated that the denial of certiorari is not to be taken as an expression by the court on the merits of the controversy, the veritable flood of decisions by the court in cases involving maritime torts since 1946 clearly indicates that the court is not reluctant to pass upon a controversy of this type where it believes an erroneous determination has been made by courts it is called upon to review.

In *Curtis v. Garcia*[61] six longshoremen were injured and one killed when a pier collapsed while they were discharging a cargo of sugar at Philadelphia. The case was tried before a jury which found that the vessel owner was negligent but also found 2% contributory negligence on the part of the longshoremen.

The Third Circuit affirmed the trial

[61] 241 F.2d 30, 3 Cir. (1957).

court which had held that the contributory negligence on the part of the longshoremen-decedent barred any recovery under the Pennsylvania Wrongful Death Statute.[62] The court's opinion clearly states the applicable rule of law:[63]

> "The test is whether the right is one rooted in the general maritime law or one rooted in state law. When the origin of the right has been determined, the Court, Federal or State, must apply the law of that jurisdiction in which that right originated. *The plaintiff, in seeking recovery under the Wrongful Death Statute, undertakes the enforcement of a right which is neither rooted in or recognized by the maritime or the common law, but is wholly state created.* There was sufficient evidence to submit to the jury the issue of the decedent's contributory negligence and the District Court correctly decided that *the plaintiff's claim, which was based on the Pennsylvania Wrongful Death Statute was governed by the law of the State and was therefore barred by the decedent's contributory negligence.*"

In accordance with this interpretation of the Pennsylvania Statute is *Klingseisen v. Costanzo Transportation Company.*[64]

Significantly the Third Circuit in *Hill v. Waterman Steamship Company,*[65] a case decided subsequent to Third Circuit's opinion in the *Skovgaard* case,[66] held that the Pennsylvania rule of contributory negligence and not the admiralty doctrine of comparative negligence applied in a suit under the Pennsylvania Wrongful Death Act for the death of a longshoreman killed in the port of Philadelphia. The court's ruling was contained in a per curiam opinion citing the *Curtis* and *Klingseisen* cases, *supra,* as authority.

Certiorari was denied by the Supreme Court of the United States on March 2, 1959.

In *Graham v. A. Lusi, Ltd.,*[67] a case discussed, *supra,* where a longshoreman was killed when a defective link in a topping lift on a cargo boom broke and the boom fell and hit him, the widow brought suit under the provisions of the Florida Death Act.[68] In holding that contributory negligence on the part of the decedent was an absolute bar to recovery the Fifth Circuit said:[69]

> "*We are in no doubt that appellant's right of action under Section* 768.01 *F.S.A., like other rights of action arising in admirally under Lord Campbell's Act and similar acts is to be enforced according to the principles of the common law and contributory negligence and the exercise of due care are absolute defenses thereunder.* Without this statute, the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representatives of a deceased maritime employee to recover indemnity for his death (citations omitted). The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the appellee under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel. (citations omitted)."

To the same effect is *Truelson v. Whitney & Bodden Shipping Company,*[70] a case brought under the Texas Death Act.[71] The deceased and a companion operated a launch in a Port Arthur Canal and were in the business of selling cold drinks and tobacco to seamen on the vessels docked there. One of the vessels docked at the port on the occasion of this suit was required by the health officers to be "breasted off", i.e. tied off approximately four feet from the dock in order to prevent infected rats from reaching shore. Decedent and his

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[62] Vol. 12, Penn. Stat. Anno., Sec. 1601-1604. "Whenever death shall be occasioned by unlawful violence or negligence. . ."

[63] 241 F.2d 36.

[64] 101 F.2d 902, 3 Cir., (1939).

[65] 251 F.2d 655, 3 Cir., (1958); certiorari denied on Mar. 2, 1959, 359 U.S. 927, 3 L.Ed2d 629, 79 S.Ct. 796.

[66] The *Skovgaard* case was argued Oct. 22, 1957 and decided by the 3rd Cir. on Dec. 23, 1957. The *Halecki* case was argued Nov. 21, 1957 and decided by the 2nd Cir. on January 10, 1958. The *Hill* case was argued Jan. 9, 1958 and decided by the 3rd Cir. on Feb. 6, 1958. Note that the *Hill* case was also decided subsequent to the 2nd Circuit's decision in the *Halecki* case.

[67] 206 F.2d 223, 5 Cir., (1953).

[68] Vol. 21, Fla. Stat. Anno., Sec. 768.01, see footnote 88 for text of statute.

[69] 206 F.2d 225.

[70] 10 F.2d 412, 5 Cir. (1926); certiorari denied, 271 U.S. 661, 70 L. Ed. 1138, 46 S.Ct. 474 (1926).

[71] Vol. 13A, Rev.Civ.Stat. of Tex., Art. 4671: ". . . wrongful act, neglect, carelessness, unskillfulness, or default. . ." Art. 4672: "The wrongful act . . . must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

partner on several occasions passed the ship by going between the vessel and the dock, passing underneath the cables. One evening the decedent and his partner were passing under the cables when the top of their launch came in contact with the first cable of the vessel. Decedent went forward toward the cable and, either when attempting to release it or when going towards it after it had been released, was struck by the cable, knocked from the launch, and drowned.

The Fifth Circuit affirmed the trial court which had denied the decedent's widow and minor daughter any recovery on the basis that the decedent's contributory negligence barred any right to recovery he might have under the Texas Death Statue. In discussing the Texas Death Act, the Court said:[72]

> "Contributory negligence of the deceased is a complete defense to such an action. (citation omitted). *When such a cause of action is asserted in an admiralty court, it is subject to the same defenses which are open to a defendant under the jurisprudence of a state whose statute gives the right of action.* (citations omitted). We conclude that the appellants were not entitled to the relief sought because the evidence adduced showed that the deceased's failure, under conditions known to him, to exercise ordinary care for his own safety, proximately contributed to his death."

This construction of the *Texas Death Statute* in connection with a maritime tort was reaffirmed in *Graff v. Parker Bros. & Company.*[73] In the *Graff* case the decedent was drowned in the Houston Ship Channel at night when a 30-foot ferry boat on which he was the operator and sole occupant collided successively with the Tug Lavinia and the lead barge of her tow. The trial court found that both parties were negligent and denied recovery. The Fifth Circuit affirmed and clearly assumed that contributory negligence would be an absolute bar to any recovery under the Texas Death Act:[74]

> "The finding that the LAVINIA and her tow were guilty of negligence is not challenged on this appeal, and it is *rightly* conceded by the parties that in this action contributory negligence on the part of the decedent will defeat appellant's right of recovery. (citations omitted)."

In *Niepert v. Cleveland Electric Illuminating Company,*[75] the plaintiff sued under to recover for the death of his wife and for damages to his motor boat, allegedly caused by the negligence of the defendant in creating a hazard to navigation by extending a pier over 1200 feet into Lake Erie without providing adequate lighting.

The trial court held that the rule of division of damages which controls in admiralty cases was applicable to the loss of the plaintiff's motor boat. However, the trial court denied the right to recover for death on the ground that the plaintiff was guilty of contributory negligence because with full knowledge of the existence and location of the pier, he proceeded at an improper rate of speed in approaching the pier.

The Sixth Circuit held that contributory negligence was an absolute bar to a recovery for maritime tort brought under the provisions of the Ohio Death Act.[77]

> "Since the right of recovery for wrongful death occurring on the Great Lakes was created by state law and not by congressional legislation or by court decision, the District Court correctly held that substantive defenses existing under state law, such as contributory negligence, applied. This is the law long established in this court. (citations omitted).
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> "In accordance with our conclusion herein is *Levinson v. Deupree, supra* in which the Supreme Court affirming a decision of this court in 199 F. 2d 760, held that an admiralty court in enforcing a state statute giving a cause of action for wrongful death must look to the local law for its substantive rules. *The common law defense of contributory negligence, having become part of the Ohio substantive law with reference to death, was rightfully applied by the District Court.*"

In *Feige v. Hurley,*[78] the decedent was killed when a canoe in which he and his

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[72] 210 F.2d 413 (1926).
[73] 204 F.2d 705, 5 Cir., (1953).
[74] 204 F.2d 706.
[75] 241 F.2d 916, 6 Cir., (1957).
[76] Title 21, Ohio Rev. Code Anno., Sec. 2125.01: ". . . wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued. . ."
[77] 241 F.2d 919.
[78] 89 F.2d 575, 6 Cir., (1937).

companions were riding in the Ohio River was struck by a motor boat owned and operated by the defendant. Suit was filed in admiralty under the provisions of the *Kentucky Death Act*[79] and the trial court denied plaintiff's recovery on the basis that the deceased was guilty of contributory negligence. The Sixth Circuit affirmed and held that contributory negligence on the part of the decedent barred any recovery under the Kentucky Death Statute:[80]

> "The utmost that may be said is that the death of the deceased was caused by the combined and concurring negligence of both parties, and under the common law appellant must fail.
>
> "Appellant, however, insists that the common law rule is not applicable; that the rule in admiralty is that where both parties are in fault, the damages must be divided . . .
>
> "*But it is settled that no suit may be brought to recover damages for death in our admiralty courts under the general maritime law. The right exists, if it exists at all, by virtue of some statute, state or federal.* Here the death occurred, as admitted in the pleadings, in Kentucky, and the administrator's right to sue is based on a Kentucky statute (citation omitted). The action is in personam - it seeks judgment against appellee personally. *Because of the statute admiralty will entertain jurisdiction,* (citations omitted), *but such right is enforced in admiralty according to the principles of the common law and contributory negligence is a complete bar to recovery* (citations omitted) unless such defense to an action for wrongful death has been abolished in the state where the accident occurred. In Kentucky contributory negligence may be pleaded as defense to such action. (citations omitted)."

A court might read unseaworthiness into the provisions of the particular state death act and still hold that contributory negligence is an absolute bar to any recovery. In fact this result would seem to be dictated in the New York case of *Clark v. Iceland S.S. Company, supra,* where the New York court did read unseaworthiness into the state act as a primary ground of recovery. In view of the express legislative provision contained in the New York Death Act that contributory negligence is a defense,[81] it seems clear that the New York courts would hold that contributory negligence on the part of the decedent is an absolute bar to recovery.

The case of *O'Leary v. United States Lines Company,*[82] cited in the *Byrd* opinion *supra,* is not authority for the proposition that comparative negligence will be incorporated into a state wrongful death act in connection with a maritime tort resulting in death. While the court, in dictum, makes some statements that could be construed as favoring the incorporation of the maritime law into the state wrongful death acts, the court clearly recognizes that such statements are dictum only:[83]

> "In this case, however, we do not, and indeed we cannot except by dictum, pass upon the question of the law applicable to count one. The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonaby be made under either local or maritime law. Wherefore we do not reach the question of contributory negligence wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages."

In one recent case, *Holley v. SS Manfred Stansfield,*[84] the Fourth Circuit did read comparative negligence into the Virginia Death Statute.[85] In this case, a longshoreman engaged in loading potash was killed when struck by a large block of the potash. The trial court found that the decedent was negligent and denied recovery holding that contributory negligence was an absolute bar to recovery.[86] The Fourth Circuit Court of Appeals reversed and held that comparative negligence was embodied within the provisions of the Virginia Death Statute. The court relied primarily on a provision in the statute that gives the right to proceed in rem against the vessel, stating that the provision was evidence of the in-

[79]Chap. 411, Ky. Rev. Stat., Sec. 411.130 "Whenever the death of a person results from the negligence or wrongful act of another. . ."

[80]89 F.2d 577-578.

[81]Vol. 13, Decedent's Estate Law, Sec. 131.

[82]215 F.2d 708, 1 Cir., (1954).

[83]215 F.2d 712.

[84]No. 7822, 4 Cir., July 9, 1959; Federal Reporter citation not available at the time this article was sent to publisher.

[85]Vol. 2, Code of Va., Sec. 8-663, see footnote 88 for text of statute.

[86]165 F.Supp. 660 (1958).

tention of the Virginia legislature to incorporate the maritime law into the Virginia statute. The court also relied on the Second Circuit's opinion in the *Halecki* case.

Naturally, this result means that maritime workers in the state of Virginia are given preferential treatment under the provisions of the Virginia State Death Statute. The Fourth Circuit itself realized that the result it reached gave this class of workers a preferred status over other citizens of Virginia who might invoke the provisions of the act. The court recognized clearly that it was a question of state law, but felt free to make its own interpretation of the statute since the state of Virginia had not passed on the provisions of its death act in connection with a maritime tort.

It is significant to note that the Fourth Circuit completely ignored the decision by the Fifth Circuit in *Graham v. A. Lusi, Ltd.*,[87] *supra,* in which the Fifth Circuit held that contributory negligence was an absolute bar under the Florida Death Statute which contains an identical provision giving the right to proceed in rem against the vessel that was deemed so significant by the Fourth Circuit in the *Holley* case.[88] It is submitted that neither the Virginia Death Act nor the decisions by the courts of Virginia in construing that act, logically indicate the result reached by the Fourth Circuit in the *Holley* case.

The weight of authority, in the better reasoned decisions of those courts that have passed on the effect of contributory negligence on the part of the decedent in connection with maritime torts, indicates clearly that the defendant has available to him any defenses which could be asserted under the common law of the state whose statute is involved in the controversy. The terminology of the statutes themselves really afford no basis for reading comparative negligence into the statute. *Obviously, the meaning of the phrase, "the wrongful act, neglect or default must be such as if death had not ensued would have entitled the decedent to maintain a cause of action", is that the decedent must show that he would have had a right to recover had death not ensued under the common law of the state whose death statute is involved rather than under the general maritime law. Thus, in any case where the common law of the state and the decisions of the state courts in interpreting their death statute hold that contributory negligence is an absolute bar to recovery, it should clearly be a bar in the case of a death resulting from a maritime tort.* It is inconceivable that the legislatures of the various states in enacting the state death acts intended that maritime workers should have greater protection under the provision of those acts than other citizens of the enacting state.

CONCLUSION

Both the *Skovgaard* and *Halecki* opinions reiterate the established principle that in

[87] 206 F.2d 223, 5 Cir., (1953).

[88] *Florida Death Statute,* Vol. 21, Fla.Stat.Anno., Sec. 768.01.

"768.01. *Right of Action for Death Due to Negligence.*

"Whenever the death of any person in the state be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any agent of such corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness, or default, is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action, (or to proceed in rem against said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." *Virginia Death Statute,* Vol. 2, Code of Va., Sec. 8-663.

"*Section* 8-663. *Action for Death by Wrongful Act.*

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owner or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer."

suits for death resulting from maritime torts brought under state death acts, the state law controls. If any consideration is to be given to the intent of the enacting legislature, the terminology of the statutes themselves, and the decisions of the courts in interpreting the statutes in connection with maritime torts, the obvious conclusion is that there is no basis for incorporating the maritime concept of unseaworthiness or the maritime doctrine of comparative negligence into the state death acts.

Justices Brennan, Black, Douglas, and Chief Justice Warren would have the Supreme Court of the United States "fashion a remedy" in these cases. They urge this in spite of the fact that it is an axiomatic principle of American Jurisprudence that the creation of a cause of action for wrongful death has uniformly been a matter within the province of the legislature. It is submitted that their approach to the problem posed by the *Skovgaard* and *Halecki* cases is a judicial invasion of the province of the legislature. The opinion by Mr. Justice Brennan gives no hint of the possible remedy that he and the justices concurring with him would "fashion", except to imply clearly that it would mean increased exposure to liability for vessel owners and their insurers.

The legal principles governing actions for death of maritime workers brought under the provisions of state death statutes have been firmly established since the decision of the United States Supreme Court in *The Harrisburg* in 1886. While it is to be hoped that the Supreme Court will not in the future disturb the well settled principles governing this facet of a field of the law that is characterized by uncertainty, a statement from one of the leading texts in the field should serve as an appropriate caveat to vessel owners, their insurers and their attorneys:[89]

> "The perils of the sea, which mariners suffer and the shipowners insure against, have met their match in the perils of judicial review."

[89]Gilmore & Black, The Law of Admiralty, Sec. 6-1, p. 248, (1957).

The Obligation of the Insurer to Defend Under Casualty Insurance Policy Contracts

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HISTORICAL BACKGROUND

IT HAS been traditional with casualty insurers in North America to agree, in addition to an agreement to indemnify the person insured or to pay claims based on his legal liability, to defend litigation brought against him arising out of the accident or occurrence that gave rise to the damages covered under the insurance policy contract. It is easily seen that this is a matter to be given serious consideration by insureds (potential defendants), especially those engaged in highly hazardous activities which may give rise to damages and injuries of catastrophic proportions.

In recent years most insureds, well informed as to the rising tide of excessive verdicts, have avoided any difficulty in connection with defense of suits brought against them after the policy limits had been exhausted by settlement or judgment by insisting on high liability limits which for all practical purposes might not be exhausted in connection with any single accident or occurrence. This has not always been so, however. Before the revised standard language relating to the duty to defend was adopted in 1955 by the National Bureau of Casualty Underwriters, which language is now incorporated in most standard forms of automobile and general liability policies, a split of authority had developed in the various jurisdictions as to the extent of the obligation to defend suits brought under the several casualty coverages.

EARLIER HOLDINGS

In *Lumbermen's Mutual Casualty Co. v. McCarthy*, 8 A.2d 750 (N.H.) 126 A.L.R. 894, the insurance carrier paid its limits on a judgment obtained on behalf of the injured minor and subsequently refused to defend an action brought by the father for loss of services. The court held that there was no obligation to defend, saying:

"As we construe the policy it obligates the insurer to pay the liability of the insured up to the policy limits and in addition thereto, to pay those items of expense which it has definitely assumed. Until these duties of payment are fully performed, it also has the duty either to settle or to conduct the defense of actions against the insured. But, upon performance of its duties of payment its duty to defend ceases to exist and the further defense of any action pending thereafter must be conducted and may be controlled by the insured.

"This does not necessarily mean that the insurer may elect to pay the full limit of its coverage to the insured and thereby cast upon his shoulders the full burden of investigation, settlement or defense from the beginning. The reason for this is that the plaintiff, unlike the insurer in Sanders v. Insurance Company[1] did not so stipulate in its policy. Neither do we mean to hold that an insurer may abandon its defense of a claim within the terms of its policy in mid course and under circumstances which are prejudicial to the rights of the insured.[2] Having elected to defend rather than to settle, the insurer's duty is to defend in good faith and with due diligence and in such a way as to protect the rights of the insured, but, having done so up to final judgment and then having paid that judgment and incidental expenses to the full limit of its obligation we are of the opinion that it thereafter has no duty of defense."

In *Brassil v. Maryland Casualty Company (supra)* the court held that after electing to defend a suit (which incidentally could have been settled for $1500) and where a judgment for $6000 was rendered, the company could not tender the limits and cast the burden of further defense on the insured; the carrier was held liable for

*Vice President and Claims Counsel, Fireman's Fund Insurance Group.

[1] 72 N.H. 485, 57 A. 655, 101 Am. St. Rep. 688.
[2] *Brassil v. Maryland Casualty Co.*, 210 N.Y. 235, 104 N.E. 622, L.R.A. 1915A, 629.

the insured's expenses in prosecuting a successful appeal on his own behalf. A later holding (1958) in the United States Court of Appeals for the Tenth Circuit, however, interpreting the revised language of the defense agreement (see post) held that where the primary carrier (Hawkeye-Security) defended in the trial court and lost, the verdict exceeding the policy limits, the primary carrier could pay its limits into court and be absolved of any further liability for defense costs. The excess carrier (Indemnity of North America) prosecuted the appeal on behalf of the insured (and lost) and thereafter sued the primary carrier on its alleged (unlimited) obligation to defend. The Court of Appeals held primary carrier had fulfilled its obligation and expense of appeal remained where it was, on the excess carrier. See *Indemnity of North America vs. Hawkeye-Security*, 260 F.2d 361.

In *Denham vs. LaSalle-Madison Hotel Company*, 168 F. 2d 576, which litigation grew out of the tragic LaSalle Hotel fire in Chicago in the late 1940's, the insurer settled many of the claims direct and paid the remainder of its limits into court to be allocated as the court might determine since the amount of damages claimed far exceeded the insured's policy limit. This was done on the basis that the defendant was not financially able to pay all the remaining claims and that the assets available should be pro-rated among the persons who were damaged. The court held that the insurance company was discharged from further obligation under the policy when it took the above action. The court did not inquire into the question of the severability of the obligations to defend and to pay, nor was the question raised on appeal.[3]

There is no question but that the obligation to defend exists regardless of whether the suit or suits growing out of the occurrence covered by the policy exceed the limits of the policy in damages. Nor is there any question but that the insurer must take proper action to defend the litigation and protect the insured's interest and cannot blandly turn over the policy limits to the insured and wash its hands of the entire affair. As stated in 45 C.J.S. (Insurance, Section 932), page 1054:

> "Where insurer admits liability to the extent of the policy coverage but the claims asserted against insured exceed the limits of the policy, both insured and insurer have a pecuniary interest in the ultimate liability to a third party, and each becomes vested with the right to protect that interest commensurate with the extent of its potential liability".

Certainly the cases indicate, however, that the better view is that the obligation to defend is coextensive with and dependent upon the obligation to pay. In 8 Appleman Insurance Law and Practice, Section 4684, page 12, the author states:

> "Since the insurer's duty to defend is correlative with its duty to pay a judgment which might be obtained against the insured, it is apparent that the insurer has the duty of defending only those actions that are within the terms of the policy and where there has been no breach of the policy."

In *Desrochers v. New York Gas Company*, 106 A. 2d 196, the court held that an insurer's duty to defend was coextensive with its primary obligation to pay.

In *U. S. F. & G. v. Reinhart and Donovan*, 171 F. 2d 681, the United States Court of Appeals for the Tenth Circuit, in an action which arose in Oklahoma, said:

> "An insurer is not obligated to defend a groundless suit which it would not be liable under the policy contract for any recovery had therein."[4]

Prior to the 1955 revision of the standard policy language, the New York appel-

[3]The United States Court of Appeals for the Seventh Circuit said, "Upon plaintiff's tender of $10,000 (its policy limit) its liability for the payment of losses was extinguished. It was only obligated to defend 'as respects insurance afforded by this policy' and there being no further insurance afforded, we are of the view that its obligation to defend was likewise terminated. Defendant's theory would produce the incongruous situation that plaintiff would have a continuing obligation to defend notwithstanding its obligation to pay has been exhausted. We are of the view that no such liability was intended by the provision in question and that it cannot reasonably be so construed."

[4]See also *U. S. F. & G. v. Briscoe*, 205 Okl. 618, 239 P. 2d 754. Cf. *Brodek v. Indemnity Ins. Co.*, 292 Ill. App. 363 wherein the court said, "Defendant contends for the rule that if the insurance carrier would be requested to *pay a judgment* or *indemnify the insured* in the event the plaintiff prevailed, then it must defend, otherwise it need not defend, and we believe this rule is sustained by the great weight of authority".

late court in *American Employers Insurance Company v. Goble Aircraft Specialties*, 131 N.Y.S. 2d 393, held that the insurer was obligated to defend litigation despite prior exhaustion of policy limits by payment in the absence of policy language making defense provisions dependent on exhaustion of coverage.

A holding similar to the above was enunciated by the circuit court of Appeals in *American Casualty Company v. Howard*, 187 F. 2d 322. In that case the insurer's limits were exhausted by a wrongful death judgment. It was nevertheless held that even though policy limits had been paid the insurer's obligation to defend another action brought by the decedent's administrator under a separate survival statute, was owed. The federal court agreed with the dissent in the *Lumbermen's Mutual Casualty* case cited *supra*.[5]

Similarly, before the 1955 revision of the standard language, the California appellate court held, in *Financial Indemnity v. Colonial Insurance*, 132 Cal. App. 2d 207, 281 P. 2d 883:

> "The duty to defend was an absolute one by each insurer and is severable and independent of the undertaking for payment of damages (see 3 Richards on Insurance 5th Ed. Sec. 421 P. 1390" ... also "The agreement to defend is not only completely independent and severable from the indemnity provisions of the policy but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services. The insurer must investigate and conduct the defense and may, if it deems it expedient, negotiate and make a settlement of the suit".[6]

THE EFFECT OF THE 1955 *REVISION*

The standard form of policy *prior to the* 1955 *revision* contained a separate insuring agreement set forth separately in the policy and headed "Defense, Settlement, Supplementary Payments". As taken from the standard automobile liability insurance policy, it stated as follows:

> "As respects the insurance afforded by the other terms of this policy under coverage A and B (Bodily Injury and Property Damage Liability) the Company shall (a) Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; ... And the amount so incurred, except settlements of claims and suits are payable by the company in addition to the applicable limit of liability of this policy."

Pertinent parts of the new insuring agreement relating to the defense covenant of the policy are quoted verbatim:

> "With respect to such insurance as is afforded by this policy, the company shall (a) Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; ... And the amount so incurred, except settlements of claims and suits are payable by the company in addition to the applicable limit of liability of this policy."

The significant change respecting the two covenants is in the introductory phrase *"as respects the insurance afforded by the other terms of this policy."*

Whereas there were several decisions, cited above, favorable to the insurer, based on the covenant in effect prior to the 1955 revision as well as some contra, we have not been able to find any decisions bearing directly on the point subsequent to the 1955 revision going into effect.[7] The *Lumbermen's Mutual Casualty Company* case cited *supra* contains some significant language which has guided the courts in arriving at a fair and equitable conclusion regarding disputes as to the extent and limitation of the insurer's obligation. The court said:

> "This does not necessarily mean that the insurer may elect to pay the full

[5] See also *Anchor Casualty v. McCaleb* (5 Cir.) 178 F. 2d 322 (Tex.) and *City Poultry v. Hawkeye* (Mich.) 298 N.W. 114.

[6] Cf. *Grand Union Company v. General Accident*, 254 A.D. 274, 4 N.Y.S. 2d 704, affirmed N.Y. 638, 18 N.E. 2d 38.

[7] See, however, *Indemnity of North America v. Hawkeye-Security*, 260 F. 2d. 361.

limit of its coverage to the insured and thereby cast upon his shoulders the full burden of investigation, settlement or defense from the beginning. It is fair to conclude that not only is the company obligated to undertake the defense but it is entitled to do so for it has its own interest in the outcome of the suit because of its obligation as to any resulting judgment." (*See General Service Corp., v. Allhoff Bros.*) 139 S. W. 2d 1062 (Mo., 1940).

Conversely, a separate and independent agreement to defend litigation irrespective of whether the insurer had any interest in the outcome of the lawsuit would amount to an agreement for the practice of law by a corporation which would be illegal.[8]

Although there has been wide variance among the several decisions bearing on this point, the courts have been in general agreement respecting the interdependence or coextensiveness of the obligation of payment and defense. Where a particular case has not come within the purview of the policy coverage, the courts have excused the insurer from both the obligation to pay and the obligation to defend.

It is equally clear, however, that the company is relieved of the defense obligation when the policy limit is exhausted by payment of either settlements or judgment, provided this will not operate to the prejudice of the insured as respects pending suits. For example, should the insured and insurer be faced with two lawsuits, both of which demand damages in excess of the policy limit and should one be tried resulting in a verdict which exhausts the coverage, the insurer cannot by merely paying his policy limit bow out in the middle of the litigation of the pending suit, to the insured's detriment. On the other hand, had only one suit been started and litigated to a finish, the judgment exhausting the policy limits, after the judgment had been paid should a new suit be started, the insurer, having no financial interest in the outcome, is not obligated to defend such subsequent suit nor, would it appear that the insurer would have the legal right to do so.[8a]

[8]See *People, ex rel. Chicago Bar Ass'n v. The Chicago Motor Club*, 362 Ill. 50.

[8a] *State Bar of Conn. v. The Conn. Bank & Trust Co.* 140 Atl. 2d 863; State ex rel. *Okla. Bar Ass'n v. Brotherhood of Railroad Trainmen*, 150 N.E. 2d 163.

The forms committee of the National Bureau of Casualty Underwriters, recognizing that some confusion had resulted from the policy language respecting the obligation to defend, in 1955, in making editorial and other changes in the standard language, made the changes set forth above. This committee in analyzing the language opined:

"(1) The right of defense, which is a valuable right to the insurer, is a subservient right to the general policy provisions to pay, and is subject to the various exclusions and conditions.

(2) It is a coextensive right with the policy limits provided, and in effect, expires with the payment of the full policy limit obligation."

The bureau then expressed the further view that the revised wording including the key words "with respect to such insurance, etc." eliminated the further possible misinterpretation of the policy which would bring about

(1) Necessity of providing a defense despite a policy exclusion which eliminated any obligation to pay;

(2) Necessity of providing a defense for property damage even where no limits for such coverage had been provided;

(3) Necessity of continuing and/or providing defense after all policy limits applicable have been exhausted.

During October, 1954, the change already referred to was made by the committee which stated that

"The intent of the defense agreement is not separate from the 'to pay' insuring agreements as to coverage limits and to counteract some courts holding contrary to the intent the Committee voted to change defense insuring agreements"

already referred to. The committee had already expressed the opinion that in the case of an accident involving injury to some 23 people and 23 suits are brought in various jurisdictions, that there was no duty to continue the defense of outstanding suits when two of them had been settled, exhausting the policy limit for the accident, *unless* prejudice to the insured was involved such as a company withdraw-

ing from the conduct of suits on the eve of trial.

Specifically the changes made by the forms committee were directed towards denying defense coverage, where, for example, no liability coverage applied because of the application of an exclusion; or where the policy limits have been exhausted in a particular mutliple claim accident and *no prejudice* accrued to the insured as by withdrawing from the conduct of suits on the eve of trial. The intent was made abundantly clear, particularly in the Family Automobile Policy and the individual owner's policy, which made the defense coverage a part of the liability insuring agreement and made the supplementary payments provision a separate insuring agreement.

OPINIONS OF INDUSTRY SPOKESMEN

On a matter of such transcendent importance involving a contractual obligation of this magnitude which may involve large sums respecting the cost of litigation, it is not to be expected that a unanimity of opinion will evolve. There is no question as to the intent of the drafters of the form as already set forth, nor is there any question of the intent of the underwriters who have the insurer's responsibility in issuing this contract and in interpreting it to agents and brokers as well as insureds. While certain bias might be charged with respect to these views, it would be folly for an insurance company to take an arbitrary stand not borne out by its intent and the logic of the situation. Similarly, it would be folly to change the language to accomplish a purpose and fail to reach the desired goal. It would indeed be imprudent for senior claims executives of representative companies to place a biased and prejudiced interpretation on a contract that they were convinced would not stand a judicial test. The following are official views of counsel or claim executives of representative insurance companies.

Harold Scott Baile, deputy general manager of the General Accident Fire & Life Assurance Corporation, Ltd., has stated:

> "We feel that the present policy language makes it eminently clear that the obligation to defend only exists with respect to a suit seeking damages 'which are payable under the terms of this policy' and that damages (costs of defense) are not payable under the policy when the limits have been exhausted."

Roy R. Stitt, vice president, Insurance Company of North America, has stated:

> "Although the number of cases we were required to defend and handle after the policy limits were exhausted under the old language was insignificant when compared to the whole, the revision in the policies was timely ... The change made by the forms committee was limited to a few words but it is my conviction that such words effectively accomplished the intended purpose. With confidence I would undertake to resist an action challenging the purpose of the revised 'Defense, Settlement, etc.' insuring agreement of the standard liability policy."

Ellsworth Miller, vice president, Maryland Casualty Company, says, in part:

> "The fact is that we feel that the obligation to defend, etc., was coextensive with the obligation to pay both before and after the 1955 revision."

E. A. Cowie, vice president, Hartford Accident & Indemnity Company, says:

> "We reason ..... that the obligation to defend is coextensive with the obligation to pay ...."

William Welch, secretary in charge of claims, Great American Group, stated:

> "... thus if the limits were exhausted the duty to defend would likewise be at an end."

INTERPRETATION OF THE CONTRACT: INSURER'S RIGHTS THEREUNDER

The insurance contract unquestionably and unequivocally gives the insurer *carte blanche* authority and freedom respecting the right to settle or contest a particular claim or suit coming within the purview of the coverage and imposes upon the insurer the obligation to defend suits with respect to such coverage (obligation to pay). It can be said, then, that the insurer has an absolute right with respect to the defense including the right to settle and

the right to withdraw. It logically follows, therefore, that the contract terms make the duty of defense coterminous with the duty to indemnify. In fact, the obligation to defend is dependent upon the insurer's duty to indemnify.

The defense agreement in the standard liability policy is for the benefit of the insurer. As was said in *Davison v. Maryland Casualty Company*, 197 Mass. 167, 83 N.E. 407, (1908), "But this article (regarding the insurer defending at its own cost) is not put in to add to the indemnity to which the plaintiffs are entitled. It is manifestly inserted to describe the terms on which the defense of the action which is given to the company for its own benefit .... is to be conducted."

Likewise, in *Abrams vs. Factory Mutual Liability Insurance Company*, 298 Mass. 141, 10 N.E. 2d. 82, the court stated:

> "Such a clause has been referred to as creating both an obligation and a privilege .... it is inserted primarily for the benefit of the insurer in the sense that where there is a conflict of interests between the insurer and the insured, the insurer may exercise the right to defend for its own advantage, even though from the standpoint of the insured a different course would have been preferable."

Risjord and Austin, in an article entitled, "Obligation of Insurer to Defend After Exhaustion of Policy Limits", in 6 Federation of Insurance Counsel Quarterly, 18, 22, state:

> "As a necessary corollary to insurance against liability in place of indemnity against loss, the insurance policies, for the protection of the insurer, provided that the insurer should have both the duty and the exclusive right to defend the insured."

And in a case note, 53 Harvard Law Review 496, 497, (1940), this observation is made:

> "It might be argued that provisions as to defense and settlement by the insurer are similarly inoperative where the insurer has no financial interest since these provisions are deemed to be for its protection, rather than for the benefit of the assured."

The court in *Auerbach v. Maryland Casualty Company*, 236 N.Y. 247, 140 N.E. 577, (1923), remarked:

> "The plaintiffs when they accepted the policy did so with full knowledge of the fact, if any action were brought, that they surrendered to the insurance company absolute, full and complete control of it, including the settlement or trial."

Similarly, in *Countryman v. Breen*, 241 A.D. 392, 394, 271 N.Y.S. 744 (decided in the Fourth Department, 1932), and affirmed without opinion 268 N.Y. 643, 198 N.E. 536, the court stated:

> "The insurance contract between defendant and the company is an indemnity contract. The reason why absolute authority is given the insurer in the matter of settlements with claimants against the insured is obvious. And the authority of the insurer as to this is absolute .... the insured cannot compel the insurer to settle nor prevent it from doing so."

It is clear, therefore, that from the standpoint of logic and reason the insurer has absolute control over the defense of any action brought against its insured, which of course includes the absolute discretion to settle or defend the suit to final judgment. And this absolute control over the litigation in the insurer derives from the basic financial interest of the insurer in the liability of its insured. As the court said in *Kindervater v. Motorists Casualty Insurance Company*, 120 N.J.L. 373, 199 A. 606, (1938),

> "The assured is enjoined against the voluntary assumption of 'any liability'. This is a necessary corollary of the stipulations reserving to the insurer the exclusive direction and control of the defense of claims so made."[9]

The right and control of the insurer over the defense of litigation brought against the insured within the purview of the policy is so absolute and unquestioned that in the absence of bad faith the insurer is immune from liability on account of its failure to accept the settlement offer in an amount within the policy limit where eventually a judgment is secured against

[9]Cf. *Schmidt v. Travelers Insurance Company*, 244 Pa. 286; *General Service Corp., v. Allhoff Bros., Inc.*, 139 S.W. 2d 1062.

the insured following its unsuccessful defense of the insured at the trial, (the decisions so holding are legion).

It would appear, therefore, that in the absence of bad faith (and in some minority jurisdictions, negligence) the insurer's dominion over defense would seem to be boundless. Accordingly its right to withdraw from the defense of certain litigation, after exhaustion of policy limits, if said withdrawal does not prejudice the rights of the insured, without breaching its covenant to defend is a proposition soundly rooted in the insurance contract.

RIGHT TO WITHDRAW

It logically follows that the absolute right of the insurer to settle carries with it the absolute right to withdraw after its obligation to pay has been performed. We agree that there is no right to abandon the defense of the insured at a critical stage of the litigation but there is a clear right to withdraw in the event the obligation to pay which is coextensive with the obligation to defend is fully discharged where the withdrawal can be without prejudice to the insured's interests.

Consequently, in a situation where the policy limit has been exhausted by payment either in settlement or of a verdict and the insured tenders all of its investigative material and documentary and other evidence to the insured for the defense of other litigation such action is no more bad faith than is settlement of the case.

In Automobile Liability Insurance Cases, by Risjord and Austin, quoting from case No. 364,

> "Early cases establish the right of the insurer to provide defense as against the arguments that insurer was practicing law. The answer to that argument was that the insurer was merely defending its interests. Here its interests had ceased."

And the same authors elsewhere have stated:

> "While it may be easier to understand that the insurer shouldn't and doesn't defend suits against its insured allegedly with facts completely different from the policy coverage, it may be less apparent but it is nevertheless just as true that the insurer should not and must not defend suits against its insured in which it has no pecuniary interests because it has already exhausted its policy limits. Remember that if the insurer has the duty it then also has the exclusive right and could theoretically defend the law suit for the fun of it even though the assured wants to settle. Of course, that could never happen but it does illustrate the falsity of the position that the obligation to defend is an entirely separate and distinct function of an insurance company. Where the question is raised in its pure form the insurer can and must decline to further defend a suit against the insured, even though the allegations allege facts otherwise within the coverage, where the insurer has no pecuniary interest in the outcome because its policy limits have been exhausted." (See Risjord and Austin, 6 Federation of Insurance Counsel Quarterly, 23, 24, [Spring, 1956])

We are forced to the logical conclusion that control over and interest in defense should be in one and the same person. It is quite possible that were control in the insurer and financial interest in the insured, the latter would be at the mercy of a casual, frivolous or otherwise careless defense by the insurer. It would appear, therefore, that the insurer is under a duty to turn over the defense to the insured when the policy limit has been exhausted.

It seems clear that by the unambiguous language of the standard policy, the insurer's obligation "with respect to such insurance as is afforded" thereby to defend any suit against the insured extends only so far as that part of the claim or claims against the insured which can be defended or settled in an amount not in excess of the policy limit. The phrase "with respect to" relates one subject to another. Consequently this phrase refers to the insurance afforded by the policy. And insurance means the amount of the indemnity. Thus, the obligation to defend is related to the amount of the indemnity or policy limit either in time or place or amount. Certainly a relation "in place" does not fit the context. The relation must therefore be "in time and amount". This relationship can only cover the time of the payment of the amount of the policy limit. Therefore, the obligation to defend is effective only for the time the insurance is in force and so long as the amount involved is within the policy limit. If there were any doubt as

to the interpretation of the language of the standard form prior to the 1955 revision, it has been removed by the clear import and clear intent of the introductory phrase "with respect to such insurance as is afforded by this policy". In fact, under either version that language was clearly intended to absolve the insurer of its obligation to defend after the exhaustion of its policy limit. Accordingly, whether exhaustion is accomplished by settlement or by tender upon withdrawal without prejudice to the insured, the insurer's defense covenant no longer obliges it thereafter. This is the only logical conclusion that can be drawn from the clear import of the language employed.

THE CLAIM THAT THE DUTY TO DEFEND SUBSISTS AFTER COVERAGE HAS BEEN EXHAUSTED IS BASED UPON UNSOUND REASONING.

It is unfortunate that Judge Branch in the *McCarthy* case, *supra*, wrote a short dissent which has spawned at least two decisions based on insupportable grounds. Judge Branch said:

> "(The majority opinion) disregards the language of the policy and construes the promise of the insurance company to defend not as an undertaking for the benefit of the insured but as a stipulation for the benefit of the insurer."

This dissent and the two cases that have followed it *American Employers Insurance Company v. Goble Aircraft Specialties, Inc.* and *American Casualty Company of Reading, Pennsylvania v. Howard* (both cited ante) have based their conclusions on the following erroneous grounds.

(1) That the defense covenant in the liability policy is for the benefit of the insured.

(2) That the language of the defense agreement must be construed against the insurer.

(3) That the principle regarding the obligation to *pay* being broader than the obligation to *defend* applies in cases where the issue of the duty to defend is raised because of the actual or contemplated exhaustion of the policy limit.

Proposition #1 has already been shown to be erroneous.

With respect to proposition #2, we have the *Goble Aircraft* case[10] and the *LaSalle Madison Hotel* case[10] holding directly the opposite with respect to the same language. I submit that the *Goble* holding is erroneous in that it completely disregards the introductory phrase "with respect to such insurance as is afforded by this policy."

With respect to proposition #3, there is a well established principle that the duty to defend is broader than the duty to pay. It relates particularly to the agreement to defend certain lawsuits even if such suits are groundless, false or fraudulent. It means that the insurer is obligated to defend a lawsuit which by its pleading comes within the purview of the coverage although there may be absolutely no merit to the lawsuit and the insurer may never be called upon to pay any judgment or other indemnity. A typical case is *Goldberg v. Lumbermen's Mutual Casualty Insurance Company of New York*, 297 N.Y. 148 77 N.E. 2d 171, (1948), wherein the insured sued the insurer for $3,000 legal expenses in his successful defense of a lawsuit which the insurer had refused to defend under its public liability policy unless the insured agreed to sign a non-waiver agreement. The court of appeals reversed the appellate division and granted the insured's motion for summary judgment, stating:

> "Assuming that the information passed on by the insured might have some bearing on the company's duty to pay .... it cannot affect its already established duty to defend. The courts have frequently remarked that the duty to defend is broader than the duty to pay.
>
> "In short, the policy protects the insured not only against injuries for which there is unquestioned liability, but also against lawsuits on their face within the compass of the risk against which the insurance was taken, no matter how groundless, false or baseless those suits may be."

Obviously the principle above referred to is primarily concerned with questions of coverage, that is, whether or not the facts as alleged come within the purview of the insuring agreement relating to indemnity.

[10]Op. cit. *supra*.

If they do, then the insurer must defend even though it later develops that the claim for damage was actually outside the coverage. It is in this respect that the duty to defend is broader than the duty to pay.[11]

It is clear, then, that the problem involving exhaustion of policy limits is not one involving coverage for indemnity; yet all of the cases where the rule providing that the obligation to defend is broader than the obligation to pay rests essentially on that basis. I respectfully submit, therefore, that the court in the *Goble Aircraft* case misapplied the rule that the duty to defend is broader than the duty to pay to a situation properly subject to a different interpretation. The same is indeed true in the *Howard* case.

THE INSURER'S PRIMARY OBLIGATION IS TO INDEMNIFY; ITS OBLI GATION TO DEFEND IS SUBORDINATE THERETO AND DEPENDENT THEREON: WHEN THE DUTY TO INDEMNIFY HAS BEEN FULFILLED, THE DUTY TO DEFEND NO LONGER EXISTS.

Appleman says:

"A few cases have intimated that the duty to defend and the duty to pay judgments are distinct and separate, so that the first might exist even though a policy exclusion operated to avoid coverage. But these cases are in a distinct minority."[12]

In *Magnome Inc. v. Pacific Construction Fire Insurance Company,* 197 Misc. 264, 97 N.Y.S. 2d 662, (1949), we find the significant statement .... "the insurer's duty to defend is no more than correlative with its duty to pay a judgment which may be obtained against the assured".

It is illogical to say that the duty to defend is separate and distinct and entirely independent of the duty to pay simply because the costs of defense are specifically stated in the contract as being in addition to the amount of loss. The two insuring obligations assumed by the insurer are tied together by the qualifying phrase "with respect to such insurance as is afforded by this policy" and all the tenuous arguments and philosophic musings by prejudiced minds can never tear them apart. Such leading cases as *Poultry & Egg Company v. Hawkeye Casualty Company,* 297 Mich. 509, (1941); *Hoosier Casualty Company v. Chimes, Inc.,* 97 F. Supp. 879, have clearly held the co-extensiveness and interdependence of these two insuring agreements. As a matter of fact, the Michigan Supreme Court in *Duval v. Aetna Casualty & Surety Company,* 304 Mich. 397, went to some pains to point out that the holding in the *Poultry & Egg* case involved the situation "where insurance coverage was in effect but subject to defeat by extrinsic evidence of non-coverage". The court then went on to say that where coverage was expressly excluded the duty to defend was not independent of the duty to pay.

Some of the opinions seem to resolve the question into a problem in semantics. Such opinions, by saying that the duty to defend is independent of the duty to pay because it is broader than the duty to pay, do our proposition no serious harm. The only violence done is done to the rules of logic for the proposition is largely theoretical and involves a bad theory at best. In fact, this is all that these "independent" decisions are saying. The error the court fell into in the *Goble Aircraft* case respecting this problem was in misapplying another wholly inappropriate theory which is wrong in its concept as well as in its application.

Obviously the need for defense stems from the possibility of the need for payment. If the possibility of payment could never exist, then the need for defense could never possibly exist under our system of jurisprudence. One is indeed the concomitant of the other. Logically then, if the indemnity (payment) has been paid, the need for defense no longer exists. Another way to put this same proposition is the manner we have suggested before: Control of the defense must be in the person responsible for payment.

[11] (See *Mason-Henry Press v. Aetna Life Insurance Company,* 211 N.Y. 489, 105 N.E. 826, (1914); *Grand Union Stores, Inc. v. General Accident Fire & Life Assurance Corporation,* 163 Misc. 451, 295 N.Y.S. 654, affirmed 251 A.D. 810, 298 N.Y.S. 187, (1937); *Pow-well Plumbing & Heating Company v. Merchants Mutual Casualty Company,* 195 Misc. 251, 89 N.Y.S. 2d 469, (1949); *Madawick Contracting Company v. Travelers Insurance Co.,* 169 A.D. 772, 155 N.Y.S. 75, (1915); *United Waste Manufacturing Company, v. Maryland Casualty Company,* 85 Misc. 539, 148 N.Y.S. 852, (1914); *Doyle v. Allstate Insurance Company,* 1 N.Y. 2d 439, (1956); *Lakas Corporation v. Travelers Insurance Company,* 1 A.D. 2d 15, 147 N.Y.S. 2d 60, (1955).

[12] John A. Appleman, Insurance Law and Practice, Vol. 8, Sec. 4684

Finally then, one of the inevitable results of this interrelation must be that having performed that part of the contract requiring settlement, i.e., its duty to pay, the insurer is no longer obligated under its covenant to defend.

CONCLUSION

The fact that, on a topic of such transcendent importance to the insurance buying public as well as to the multitude of insurers whose obligation is to "protect and defend" there have been so few disagreements on this subject that had to be resolved by the courts, is a strong indication that the question at least in the minds of most experienced lawyers and company executives is well settled. (1) I submit that the view that the obligation to defend is co-extensive and co-terminous with the obligation to pay and is terminated upon exhaustion of the policy limits is the sounder view. (2) As shown above, it is the accepted view of the majority of the courts that have carefully and exhaustively considered the problem. (3) Those decisions that are contra are based on lack of a full understanding of the whole contract and on unsound reasoning. (4) The revised wording on the 1955 revision makes it abundantly clear that the policy limit is inseparably bound up with the obligation to defend, and that while the company (insurer) most assuredly does not stand relieved of its defense obligation merely by tendering its policy limits; but rather must provide a full and competent defense at lease until actual settement of claims or payment of verdicts has exhausted its limits. Then, clearly the insurer should be relieved of its defense obligation (having discharged it) provided this does not prejudice the insured as respects other claims and suits.

The Growing Cost of Tort Litigation and Its Significance to The Public and The Profession*

E. A. COWIE**
Hartford, Connecticut

MY SUBJECT is not calculated to endear a speaker to his fellow lawyers. However, I take comfort in two things (1) The subject was assigned to me; (2) J. Harry LaBrum has, to some extent, paved the way by his excellent article in the July issue of the American Bar Association Journal.

Furthermore, the subject poses quite a dilemma. Much has been written recently concerning the financial plight of the legal profession. It is said that only a third of the lawyers have incomes in excess of $10,000 whereas eighty per cent of the doctors exceed that figure. Something, it is suggested, needs to be done to raise the income level of the legal profession; and, yet here am I, with the temerity to suggest that in the negligence field, lawyers are already taking too big a slice of the public dollar.

First of all, I suppose there should be some evidence that the cost of tort litigation is growing out of proportion to everything else. We know that some increase is inevitable because there is more tort litigation and the cost of doing business for lawyers has gone up like it has for every other business.

One index of the increase in costs should be the amounts paid out by casualty companies to defense lawyers in different periods. In my own company, for example, we paid out $1,949,984 in 1952 by way of defense fees whereas in 1958 we paid out $3,293,376. That's an increase of 68%, but in that period the automobile and other liability claims that produce the bulk of the litigation increased only 21%; and, for the first six months of 1959 we show an increase of almost $400,000 over the same period of 1958.

Of course, if we simply became more litigious during this period we could expect higher fees, but the fact is that we had just about the same percentage of cases in litigation at the end of 1958 as we had at the end of 1952. To me, it is inescapable that the average cost of defense per case has risen rapidly and is continuing to do so.

Unfortunately, our industry does not report pure legal costs to any central point so there are no figures for the industry as a whole. My friends in other companies tell me, however, that their experience is about like ours. Some have expressed alarm about the situation for, as you may know, legal fees represent the largest single item of claim department expense other than salaries, and to some extent, at least, they are supposed to be controllable.

Some factors beyond anyone's direct control have contributed to this increase. For one thing, the presently popular pre-trial procedure of many states inevitably results in higher costs to the defendant and to the plaintiff as well. Maybe there has been a beneficial effect on court congestion in some areas, but I must admit to mixed emotions concerning the device. Where the judges are really trying to get cases settled, they must, of necessity, hammer the plaintiff over the head to get his demand down, the defendant to get his offer up—so, what do the parties do? The plaintiff simply holds back on his rock bottom demand, the defendant on his top offer, leaving some room for the maneuvers of the pre-trial conference. I think we have to some extent added to calendar congestion by delaying the disposition of many cases that were previously settled between the parties.

For one example of the added cost to defendants, I know of one area where the minimum fee schedule of the bar calls for a fee of $100 per pre-trial appearance. Apparently, it matters not that the attorney may handle several pre-trials in one day for one or more clients—each is charged the minimum fee per case.

Another factor is the great extension of discovery procedure in federal practice and

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in the practice of many states. This results in a new flood of depositions, examinations before trial, interrogatories, or what have you. Attorneys insist generally that we must go through all of the procedures permitted us and naturally the costs increase. Strangely enough, it seems that we do just about as well in the states that do not recognize extensive discovery proceedings as we do in the others and at a much lesser cost. For example, I saw one uncomplicated automobile case in this very state recently wherein it cost us $4,800 in legal fees to go through the first round of a law suit that resulted in a verdict of $10,000. This is happily uncommon, though not unusual.

Another factor is the great extension of liability that we see after every session of almost every state legislature. It is obvious that many of these bills are so-called lawyers' bills, designed only to help the plaintiff. Seldom do we see any limitation on the right to recover—it's ever onward to make it easier for a claimant to collect. A great many of these bills are obviously the work of lawyers with, I suspect, the lay members of the legislature having little idea of what they are approving. Occasionally I am sure an evil that was done in one instance prompts a law change that sweeps in everybody. Here are a few examples:

Connecticut has a new law to the effect that any release obtained in a bodily injury case within 15 days after the date of the tortious act is voidable at the option of the releaser. Isn't that fine for the lawyers?

North Carolina has one providing for the assessment of attorneys' fees upon any judgment of less that $500— of course, with no provision for attorneys' fees to the defendant if he prevails in an action capriciously brought.

Vermont now provides that actions may not be consolidated for trial except by consent of all parties, and this includes counter-claims. In Vermont, I suspect we will now be seeing many cases wherein both parties to an automobile accident recover.

There are many other developments in the field of negligence law that add to the cost, but I would be remiss if I failed to touch on the greatest single cause—exaggerated and phony claims. This continues to be the plague of the insurance industry and unfortunately neither bench, bar, nor the public seems to be more than mildly interested. Edward P. Gallagher, of Indianapolis, a member of this section, has been a vehement spokesman on the problem and sooner or later the bar will have to accept its responsibility. No one, let alone the insurance industry, quarrels with the so-called adequate award that compensates a claimant who is entitled to be compensated under our law, fairly. I can even agree with the NACCA people who say that verdicts, particularly adequate verdicts, take but very little of the insurance dollar. They do, of course, inevitably have a profound effect on settlements in other cases, but I am convinced that the casualty insurance company plight results not so much from the big cases as from the thousands upon thousands of built-up cases that cost less than $5,000.

You all know the technique: if a plaintiff has been in a slight rear-end accident, have him stay out of work as long as possible; have him run up substantial bills with several doctors, including x-rays of every bone in his body; delay the examination by the defendant's doctor as long as possible and then you have "specials" of several hundred dollars that will support an opening demand of several thousand dollars. Start a law suit, negotiate a little perhaps — but wait until the case comes up for pre-trial. The judge may then force a compromise between your demand and the offer of the defenant if the defendant has not earlier decided that the cost and uncertainty of a trial makes it necessary to meet your demand.

This is not mere suspicion by the insurance company — cases by the legion have been exposed in every official investigation and by individual effort of company personnel and defense attorneys. That the widespread practice should exist is almost as bad a blot on our profession and on public morality as the current situation in labor unions, that is receiving so much publicity.

So much for the facts of increasing cost — let's look at the results to the public and the profession as we are supposed to do. Well, as usual, it's the good old public that pays the ultimate bill. When we talk of defense costs, we normally talk of the fees paid by insurance companies. These, of course, go into the rating structure and become part of the cost of insurance. When we talk of plaintiffs' fees, we again must relate them to insurance rates for they represent a sizeable portion of the take of the plaintiffs and I expect we'd be pretty naive if we didn't admit that cases handled by attorneys cost us more money than those

settled direct with claimants. By a little quick figuring, it is easy to see that as much as 25 cents of the premium dollar may be going to the legal profession. Add another 40 cents for the inevitable acquisition expense and cost of doing business and we arrive at a justifiable gripe by the public that only a small fraction of what they pay goes to the claimant.

This gripe by the public, though not often analyzed beyond the mere fact of cost to the buyer, is beginning to be translated into action in too many ways. After all, an insurance policy is sort of an abstract proposition. It's necessary, but you can't eat it, you can't enjoy looking at it, it doesn't earn anything for you except a certain peace of mind — in fact, in many respects, casualty insurance is like taxes.

Actually, the public ignorance about the casualty business is frightening. A survey not too long ago showed that people have no idea how casualty insurance rates are made; they don't realize that premiums must cover expenses as well as claims; they are positive that insurance companies make fantastic profits. How easy it is, therefore, for the public to latch on to and support schemes that seem to offer a solution to price problems particularly when they are aided and abetted by our own profession. The American Medical Association is acutely aware of this problem as far as they are concerned. Their bugaboo is government health programs just as ours is government operation of the insurance business. The AMA president stated at the opening session of the recent annual convention that organized medicine must hold the line on doctors' fees, hospital charges and health costs if it doesn't want the "politicians" and the federal government to take over.

My reference to "aiding and abetting" by our own profession concerns the oft repeated statements by our NACCA friends that insurance companies are well able to pay the more and more adequate awards out of their swollen profits.

Coming from a group that has more to lose than most if drastic changes are made, these statements seem a little absurd, particularly when they are not supported by the facts. My copy of the 1959 Argus Chart shows that stock casualty companies lost $244,257,652 in 1957 from their underwriting and $76,142,577 in 1958. This doesn't sound like swollen profits to me and bear in mind the reports that make up these totals are subject to audit by the state insurance examiners to say nothing of Uncle Sam.

True, some of the companies were able to offset their underwriting loss to some extent by investment income, but I doubt that many thinking people want the stability of insurance companies determined by the condition of the market.

It is easy to say that insurance companies will merely pass these losses along to the public in the form of higher rates, but in the face of increasing public resistance, this becomes harder and harder to do. The public officials who must approve rates are acutely aware of public sentiment as witness the several law suits that were necessary to secure necessary increases in states like Illinois, New York and Massachusetts. Furthermore, the companies are very much aware of the fact that increases in rate levels are not the sole answer for there is the grave danger of pricing ourselves right out of business.

You have some evidence of the increasing public clamor for lower rates in the current agitation for a compensation plan to compensate victims of automobile accidents. California has already appointed a commission to conduct an inquiry into the feasability of such a proposal and to prepare an analytical report. Other states are supposedly considering the idea.

And so I say to you that the increasing cost of litigation plays a substantial part in the current agitation for other plans that will not only lower the cost of insurance but will be designed to compensate victims more speedily.

The effect of the increased cost of litigation on insurance companies is obvious. We are doing our best to hold it to reasonable levels, but therein lie several problems. If we settle too many cases of no liability because the settlement cost is less than the cost of defense, we encourage more of the same and we run afoul of our policyholders, at least those whose rates are affected by their experience. On the other hand, if we don't dispose of our cases we are accused of being responsible for court congestion and our legal costs go skyhigh. The tendency is, of course, to avoid litigation whenever possible and to that end we see increasing use of arbitration facilities as witness the inter-company arbitration agreement for collision subrogation cases and the current provision in uninsured motorist cov-

erages for arbitration of disputes between the insured and the company.

The effect on the profession is, of course, readily discernible by looking at the reaction of the public and the insurance industry. If public opinion forces a compensation plan for automobile insurance, there will inevitably be a dramatic reduction in the take of attorneys for both plaintiff and defendant. If other plans designed to remove claims from litigation such as the voluntary compensation plan of one large company, become popular, then there will be a further lessening of the income of the legal fraternity. It looks to me like the companies and the lawyers are pretty much in the same boat.

So — we have viewed with alarm, and I hope the conclusion is inescapable that something needs to be done about the situation before we have too many remedies that will be even worse than the disease.

What can we do about the problem? . . . well, several approaches have been suggested. Mr. LaBrum urges study and analysis of the situation by the bar plus aggressive leadership in shaping the future. Mr. Lawrence suggests that the churches and schools of the nation might be a major factor in combating the public breakdown of morals as far as insurance fraud is concerned. Mr. Gallagher thinks that insurance companies should do more to let the public know why rates are so high with emphasis on the millions going to lawyers in the form of contingent fees.

I have a few suggestions myself:

1) It seems to me that decent lawyers should become much more active in policing their ranks. This probably involves more active participa ion in local bar associations and particularly in the activities of grievance committees.

2) Lawyers should be concerned actively and militantly with proposed legislation which tends only to increase the insurance bill of the public.

3) There should be some judicial restraint on the too prevalent practice of forcing settlemen s at pre-trial, or trial, regardless of the merits.

4) Defense attorneys should consider more carefully the economics of the situation before embarking on an endless stream of pleadings that serve only to delay the inevitable, on depositions taken as a matter of course because the practice permits them to be taken and on other non-essential steps.

On this latter point, I have an idea that a more judicious allocation of time and effort to achieve the most economical disposition of cases might in the long run result in as much or more money to the defense fraternity even though spread over more cases. We might, for example, be able to contest or hold to more reasonable levels many cases that are now settled because of the legal costs that are anticipated. Call it a "managed economy", if you like, but I believe it is worth a trial.

5) There should be sensible moderation in the far-reaching attempts to have long established customs declared the practice of law. I have heard, for example, that some segments of the bar would like to enjoin insurance companies from handling litigation through salaried counsel. In New York City alone this would cost the industry several millions of dollars annually to say nothing of the dislocations it would cause. Maybe it's the thing to do, but certainly it is not a move that should be undertaken lightly.

In conclusion, I believe there is no question that the total cost of tort litigation has grown alarmingly. I believe it has reached such proportions that the very existence of private insurance is threatened and that this, in turn, threatens an important segment of the legal profession. We may not have felt much compulsion to be crusaders in the past; but gentlemen, matters have reached the point where there is grave danger of killing the goose that lays the golden egg.

The 1958 Amendments Affecting Jurisdiction of the Federal Courts*

C. CLYDE ATKINS**
Miami, Florida

SINCE JULY of last year the federal courts have been operating under certain amendments which reduced their jurisdiction in civil actions involving diversity of citizenship. The amendments to 28 U.S.C.A., Section 1332, made two basic changes. The minimum amount in controversy was raised from an amount in excess of $3,000 to an amount in excess of $10,000, and a section was added providing that a corporation "shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business."

Of course, these provisions are applicable not only to cases originally filed, but also to those removed to the federal courts after having been initiated in the state courts. In this connection it should be mentioned that the statute, 28 U.S.C.A., Section 1445, controlling nonremovable actions, also was amended. It precludes removal of civil actions in state courts arising under the workmen's compensation laws.

In addition to these two basic changes, the district courts are granted discretion to deny costs to, and in fact impose costs upon, a plaintiff who originally filed his suit in the federal court if the judgment ultimately rendered in his favor amounts to less than $10,000.

The theory supporting federal jurisdiction of civil cases involving diversity of citizenship has been stated to be the desire of the Congress "to insure a competent and impartial tribunal for citizens of different states" and "to provide a separate forum for out-of-state citizens against supposed local prejudices."[1]

But aims which are philosophically laudable some times yield to practicality. Thus there has been a continuous program on the part of the federal courts strictly to construe the statute relating to diversity and removal, and to resolve all doubts against federal jurisdiction. The Congress is credited with having adopted a similar attitude.

> "There is no question but that the recent trend in legislation has been to restrict jurisdiction in regard to removal causes in order to reduce the high volume of state cases that have been pouring into the United States Courts. Also, removal sections traditionally have been strictly construed and all doubts have always been resolved against removal"[2].

Not content with legislative restrictions and strict judicial construction as bulwarks against excessive resort to the federal courts, the Congress employed the device of requiring a prescribed minimum amount to be involved in order for jurisdiction to be invoked. In 1789 the original minimum was $500. It was increased to $2,000 in 1888, and in 1911 to $3,000. For the past year it has been $10.000.

These several deterrents to the actual exercise of jurisdiction obviously cannot be reconciled with the high-minded purpose of creating diversity of jurisdiction in the first place. It seems particularly illogical to afford immunization from local prejudice only to the litigant whose claim or potential liability is in excess of $10,000. No sound reason suggests why there should be less local prejudice in a case involving less than $10,000.

It should also be remembered that for any reduction in the federal case load there is a corresponding increase in the work to be handled by the state courts, some of which suffer from appalling congestion.

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[1] *Browne v. Hartford Fire Ins. Co.* (D.C., Ill., 1959) 168 F. Supp. 796, at 797; *Burt v. Isthmus Development Co.* (5 Cir., 1955) 218 F. 2d 353, at 356.

[2] *Browne v. Hartford Fire Ins. Co., supra.*

It is difficult definitely to determine the effect of these amendments because of the tremendously varied matters which are litigated in the federal courts and local situations which may greatly distort the broad picture [3]. However, statistical data furnished by the Administrative Office of the United States Courts would indicate that diversity cases have fallen off during the past year by about 15%. This apparently means something in the neighborhood of 6500 cases or an average reduction of about 750 cases in each of the 86 districts.

One provision of the amendments made them applicable "only in the case of actions commenced after July 25, 1958." This language created a problem in cases filed in state courts prior to the effective date of the amendments and which were sought to be removed after July 25, 1958. Some of the district courts held that the word "commenced" meant commenced in the federal court by the filing of the petition for removal. [4] Other courts held that the term "commenced" referred to the time of filing the complaint in the state court. [5] Due to the passage of time, this point probably has become moot.

The jurisdiction of the Dade County (Florida) circuit court ranges from $5,000 to infinity. It is the general practice of plaintiffs in this area not to demand a particular sum but merely to ask for damages "in excess of $5,000." If diversity of citizenship is present, this immediately creates a question of whether the action is removable. The ad damnum asks for damages in an amount over $5,000, but does it ask for more than $10,000? It is the practice in my own office to petition for removal in this circumstance. We feel that this puts the burden on the plaintiff of showing that he is demanding an amount not in excess of $10,000. If he wishes to amend and ask for an amount between $5,000 and $10,000, we, of course, have no objection. In at least one case a plaintiff has made such an amendment as a result of which the case was remanded.

The corporate aspect of the 1958 Amendments is in many respects the most interesting. A corporation now is considered a citizen of both the state in which it was incorporated and the state in which it has its principal place of business. *Harker v. Kupp* (D.C., Ill. 1959), 172 F. Supp. 180, involved the rather novel contention that the amendments gave the plaintiff a right to choose or elect whether he would allege the citizenship of the defendant corporation to be the state of its incorporation or to be the state wherein it maintained its principal place of business. There the defendant's principal office was in Illinois, while Wisconsin was the state of its incorporation. The plaintiff was a citizen of Illinois and he claimed there was diversity. The court held where either of a corporation's two citizenships coincided with that of the other party, diversity did not exist.

In *Browne v. Hartford Fire Insurance Company* (D.C., N.D., Ill., 1959) 168 F. Supp. 796, it was held that a defendant corporation seeking to remove a case from a state court must allege its principal place of business. In the *Browne* case the court quotes from the Congressional Record to establish the purpose of the corporate amendment to Section 1332, as follows:

> "It is now established doctrine that a corporation, for the purposes of jurisdiction is deemed a citizen of the State in which it is incorporated * * * It is by virtue of this rule, which is now long standing and thoroughly imbedded in our jurisdiction, that so-called out-of-State corporations may sue and be sued under the diversity jurisdiction where it is sued or being sued by a citizen of a State other than the State of its incorporation. This diction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litiga-

[3] A deputy clerk of the Miami division of our United States District Court states that he has observed little, if any decrease in the number of cases filed during the last year involving diversity of citizenship. On the other hand, attorneys in the St. Louis area, where a number of actions are filed against Illinois motorists, report that, as a result of the increase in the jurisdictional amount, plaintiffs' attorneys are simply suing for $10,000 and thus effectively preventing removal.

[4] *Abernathy v. Consolidated Cab Co.* (D.C. Kan., 1959) 169 F. Supp. 831; *Lorraine Motors Inc. v. Aetna Casualty and Surety Co.* (D.C. E.D., N.Y., 1958) 166 F. Supp. 319; *Castel v. Great Southern Trucking Co.* (D.C. E.D., Tenn., 1958) 167 F. Supp. 435.

[5] See for example *Stahl v. Paramount* (D.C. S.D., N.Y., 1958) 167 F. Supp. 836; *Lomax v. Duchow* (D.C., Neb., 1958) 163 F. Supp. 873; *Kieffer v. Travelers Fire Ins. Co.* (D.C., Md., 1958) 167 F. Supp. 398.

tion into the Federal courts simply because it has obtained a corporate charter from another State * * * This circumstance can hardly be considered fair because it gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have. The underlying purpose of diversity of citizenship legislation * * * is to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts. Whatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State. It is a matter of common knowledge that such incorporations are primarily initiated to obtain some advantage taxwise in the State of incorporation or to obtain the benefits of the more liberal provisions of the foreign State's corporation laws. Such incorporations are not intended for the prime purpose of doing business in the foreign State. It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen. Because of these circumstances, and others, the Judicial Conference of the United States has recommended that the law be amended so that a corporation shall be regarded not only as a citizen of the State of its incorporation but also a citizen of the State in which it maintains its principal place of business. This will eliminate those corporations doing a local business with a foreign charter but will not eliminate those corporations which do business over a large number of States, such as railroads, insurance companies, and other corporations whose businesses are not localized in one particular State. Even such a corporation, however, would be regarded as a citizezn of that one of the States in which was located its principal place of business."

(See also *Roseberry v. Fredell,* (D.C., Ky., 1959) 174 F. Supp. 937.)

Perhaps the most interesting aspect of the amendment making a corporation a citizen of the state where it has its principal place of business is that this places upon the federal court the burden of deciding a more complex fact determination than has been necessary under the prior form of the jurisdictional statute. This is pointed out in *Scott Typewriter Co. v. Underwood Corp.* (D.C. S.D., N.Y., 1959) 170 F. Supp. 862. In that case the court was faced with the necessity of determining the defendant corporation's principal place of business. In the decision, at pages 864 and 865, the court said:

"The question essentially is one of fact, 'to be determined in each particular case by taking into consideration such factors as the character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.'

* * *

"Where a corporation is engaged in multi-state activities, with offices, facilities or plants in various states, the issue of the location of its principal place of business cannot be resolved by fragmentation of its activities at specific places. It is not answered by a separation of corporate activity into component parts. The issue must be resolved on an overall basis. It is governed by the totality of corporate activity at a given place, which, to borrow a phrase from another area of law, may be said to represent the 'center of gravity' of corporate function.

* * *

"Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective."

It can be readily seen that in determining the principal place of business of a corporation the federal courts may be faced with the necessity of taking considerable evidence regarding the activities of the corporation before they can make their determination.

The 1958 amendment to Section 1332 and the cases implementing it certainly evidence a trend toward restricting the

jurisdiction of the federal courts. It cannot be disputed that this trend is intended at least partially to relieve the federal courts of their increasing case load. Perhaps this trend also reflects less fear of local prejudice and increased confidence in the quality of justice dispensed by the courts of the 50 states which now comprise the Union.

Editor's Note: The following supplemental statement is provided by J. Woodrow Norvell, Memphis, Tennessee:

Now, regarding the 1958 amendment as it affects Workmen's Compensation Law, we note in Subsection (c) of Title 28, Section 1445, U. S. Code Annotated, this provision, "A civil action in any state court arising under the Workmen's Compensation Law of such State may not be removed to any district court of the United States." A review of the legislative history in connection with this amendment indicates that this legislation was brought about primarily through a back log of workmen's compensation cases removed from state courts in Texas to the U. S. District Courts. The amendment was also designed to place compensation cases in the same category as to original venue as cases under the Jones Act, The Fair Labor Standards Act and The Railway Employers' Liability Act—that is, the workman has the option of filing his lawsuit in either the state or the federal court, but he is bound by the election he makes. The defendant is likewise bound, for if the suit is instituted in state court under this amendment the case cannot be removed to a federal court. If the suit is originally filed in a federal court, it does have jurisdiction to determine the issues involved, providing, of course, the federal court has jurisdiction in the first instance.

Contingent Fees–Gair v. Peck*

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THREE years ago the Appellate Division of the Supreme Court of New York in the First Judicial Department adopted its Rule 4, dealing with "Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death".[1] In litigation testing the validity of the rule, the Supreme Court at Special Term adjudged that the justices individually and the court in which they served were without power to promulgate and enforce the rule.[2] The Appellate Division of the Supreme Court in the Third Judicial Department unanimously affirmed that judgement.[3]

On appeal to the New York Court of Appeals, the judgments below were reversed, and the opinions written in connection with that decision are the subject of this report. It is understood that the losing parties contemplate filing a petition for a writ of certiorari to the United States Supreme Court.

THE RULE

The relevant language of the rule under consideration is, as follows:

"(a) In any claim or action for personal injury or wrongful death, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorneys is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorneys, pursuant to agreement or otherwise, of compensation which is equal to or less than the fees scheduled below is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association, unless authorized by a written order of the court as hereinafter provided.

(b) The following is the schedule of reasonable fees referred to above: either,

(1)

(A) Fifty per cent. on the first one thousand dollars of the sum recovered,
(B) Forty per cent. on the next two thousand dollars of the sum recovered,
(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered,
(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered; or

(2)

"A percentage not exceeding thirty-three and a third per cent. of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentages shall be computed on the net sum recovered after deducting taxable costs and disbursements, and expenses of legal, medical, investigative, or other services properly chargeable to the claim or action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals, treating doctors, nurses, selfinsurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorneys believe in good faith that the foregoing schedule (1), because of extraordinary circumstances, will not give them adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had

*6N.Y. 2d 97, 160 N.E. 2d 43 decided May 28, 1959

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[1]The rule was adopted September 21, 1956 and amended December 19, 1956.

[2]6 Misc. 2d 739

[3]5 A.D. 2d 303

been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the Trial Term Calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the Trial Term Calendar part of the Supreme Court for the county in the First Judicial Department in which the attorneys filing the statement of retainer, pursuant to Rule 4-A, have an office. Upon such application, the justice in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the foregoing schedule (1), provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorneys. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application."

THE MAJORITY OPINION—

The majority opinion was delivered by Van Voorhis, J., and concurred in by Chief Judge Conway and Judges Desmond, Dye and Fuld. This opinion notes that the record on appeal disclosed that in recent years contingent fee agreements have been filed with the Clerk of the First Department at the annual rate of 150,000 or more, of which upwards of 60% have fixed the attorneys' compensation at 50% of the amount of the recovery; that 95% of the actions brought were settled, and not more than one and one-half per cent of all claims of this nature have gone to judgment after trial.[4]

Mention is also made of Canon 13 of the Canons of Ethics of the New York State Bar Association, which provides:

"A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."[5]

Judge Van Voovhis continues:[6]

Taking cognizance of this situation, and noting that contingent fees are generally allowed in the United States because of their practical value in enabling a poor man with a meritorious cause of action to obtain competent counsel, the First Department adopted Rule 4 with a preamble which concludes:

"When, however, the contingent fee reaches or approaches the 50 per cent level, it ceases to be a measure of due compensation for professional services rendered and makes the lawyer a partner or proprietor in the lawsuit. This is not a permissible professional relationship or a proper professional practice.

"The court considers the schedule adopted to allow ample compensation for the best efforts and services of competent counsel. It recognizes the possibility that extraordinary circumstances may exist in a particular case which would make the resulting compensation inadequate. The court will make special allowance in such cases and grant an application for larger compensation."

The complaint does not attack the reasonableness of this rule or its need. One of the plaintiffs' moving affidavits states:

"Whether the Rule is good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, responsive or not to the ethical and moral standards of the community, serving or damaging to professional and public interests, it is our contention that the Appellate Division was without power to adopt the Rule and is without power to enforce it."

Plaintiffs have not put in issue and have thus recognized for the purposes of the action that the rule is good, necessary, desirable, fair, responsive to the ethical and moral standards of the community and serving professional and public interests. The power to adopt the rule is challenged, but the question of power has to be decided in the light of these circum-

[4]In his dissenting opinion, Judge Burke says that the "number of closing statements filed each year is about 50,000."

[5]6 N.Y. 2d, 103.

[6]What follows is the exact language of the opinion. Quotation marks are omitted for ease of reading.

stances. The issues before us have been drawn in this manner by the parties.

This rule was held to be invalid by the Third Department upon two grounds: (1) that it is inconsistent with section 474 of the Judiciary Law providing that the compensation of an attorney is governed by agreement, and (2) that the Appellate Division lacks power of discipline over attorneys regarding excessive fees except "in the individual case and after the event." Mention is not made in the Appellate Division's opinion of any other ground in the opinion at Special Term, such as that the rule is one of substantive law applying to only a segment of the State, or that disciplinary power over attorneys is unrelated to how much they charge their clients. Special Term did recognize that there may be such a thing as an "unconscionable" contingent fee agreement, but remarked that this must be decided as a question of fact whereas rule 4 is said to establish it as a matter of law.

Special Term's criticism of the rule on the ground that it establishes substantive law applicable to but one segment of the State, will first be considered. If this comment were well founded, it would be a fatal defect—the Appellate Divisions cannot make substantive law by rules, and, acute as the problem is in the metropolitan counties, it could hardly be held that the attorney and client relationship is governed by different substantive law in New York City or in different parts of New York City. Upon the other hand, if rule 4 does not change the substantive legal relation between attorney and client, but merely supplies a procedure for determining on the basis of the real facts whether a lawyer is subject to discipline for charging more than he could collect in court from his client under law applicable to every part of the State, rule 4 was properly adopted under section 83 of the Judiciary Law, which enables a majority of the Justices in each Department to make rules not inconsistent with any statute or rule of civil practice. The rules which have been adopted in the different Departments show that within these limits rules regarding procedure or disciplinary matters do not have to be uniform in all Departments, just as investigations of attorneys may be conducted in one Department without being conducted in others (*People ex rel. Karlin v. Culkin*, 248 N.Y. 465).

It has been held by the judgment appealed from that rule 4 purports to alter the substantive law governing the relationship between attorney and client, and that in doing so it conflicts with section 474 of the Judiciary Law insofar as section 474 states that the compensation of an attorney is governed by agreement, express or implied. The Appellate Division, Third Department, and Special Term have both started with the assumption that rule 4 threatens disciplinary action against lawyers who make retainer agreements with clients that would otherwise be valid and enforcible under section 474 of the Judiciary Law. It follows from this false premise that the effect of rule 4 is to regulate fees of attorneys differently from the way in which they are regulated by statute. We find no basis for this assumption in the language of the rule, in its preamble, or in the evil which it proposes to remedy. The rule does not touch lawyers' fees except such as would be unenforceable in any event under section 474 of the Judiciary Law. It has been implied that rule 4 prevents lawyers from charging clients what they could otherwise legitimately charge, but that assumption overlooks that disciplinary action is not threatened except against exacting fees which could not legally be enforced in the absence of rule 4. Of course the threat of disciplinary action inhibits charging more than would be sanctioned under the rule, but that is not the test of its validity. That would have been true if the rule had simply announced that lawyers would be subject to disciplinary action for charging unconscionable fees. If the rule is limited, as we interpret it, to making provision for disciplining attorneys for receiving more from their clients than could legally be collected under retainer agreements, even with the aid of section 474 of the Judiciary Law, the judgment appealed from is without foundation. The standard of decision in disciplining a lawyer or in announcing that he will be subject to discipline for violation of this rule, is whether he has charged his client more than the client is legally obligated to pay—that is to say, has charged what the courts will refuse to enforce as unconscionable in amount under a contingent fee agreement made with all the support which section 474 can supply.

It is not necessary to enter into an elaborate historical discussion of the origin of section 474 of the Judiciary Law. On

the adoption of the Field Code (Code of Pro.; L.1848, ch. 379), and under successor statutes culminating in the present section 474 of the Judiciary Law, contingent fee contracts ceased to be outlawed (are "not restrained by law"), but the courts have continued to exercise a wary supervision over them. The retention of such supervision by the courts was acknowledged by the New York State Bar Association in adopting Canon 13 of Ethics in 1909, in force ever since, which states that a contract for a contingent fee "should always be subject to the supervision of a court as to its reasonableness." The State Bar Association did not act in ignorance or in contravention of the law of the State. Notwithtanding section 474, which was in effect during all of that time, few propositions are better established than that our courts do retain this power of supervision. Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered. It matters little whether under such circumstances the formula be that the size of the fee becomes "unconscionable" or "unreasonable". Each word means the same thing in this context. The special quality of a retainer contract is recognized by the cases holding that in spite of section 474 of the Judiciary Law the client may terminate it at any time, leaving the lawyer no cause of action for breach of contract but only the right to recover on *quantum meruit* for services previously rendered (*Matter of Dunn*, 205 N.Y. 398; *Martin v. Camp*, 219 N. Y. 170). Section 474 confers upon the lawyer no inalienable right to impose on his client, and a retainer agreement becomes unenforceable in some situations where a contract would be enforceable if the parties to it were not attorney and client. In *Ransom v. Ransom* (147 App. Div. 835, 849-850), the language of Justice Nathan L. Miller, later a Judge of this court, is quoted from *McCoy v. Gas Engine & Power Co.* (135 App. Div. 771, 772-773):

> "The word 'unconscionable' has frequently been applied to contracts made by lawyers for what were deemed exorbitant contingent fees. But by that nothing more has been meant than that the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated on him. (*Morehouse v. Brooklyn Heights R. R. Co.*, 185 N.Y. 520)."

In *Matter of Friedman* (136 App. Div. 750, affd. 199 N. Y. 537) where a contract for 50% of a recovery in an accident case was held to be not fraudulent per se in all instances, the court added (136 App. Div. 751-752): "But the recovery may be such that what was in the first instance a fair contract becomes unfair in its enforcement. *** the recovery may be such that the lawyer's retention of it would be unjustified and would expose him to the reproach of oppression and overreaching. He is an officer of the court and is judged as such, and technical contractual rights must yield to his duty as such officer." In the decisions on this subject, of which there are many, it is recognized throughout that there comes a point where the amounts to be received by attorneys under contingent fee contracts are large enough to be unenforceable under the circumstances of the case. Sometimes these charges are unconscionable as matter of fact and in other instances as matter of law (*Ford* v. *Harrington*, 16 N. Y. 285; *Place v. Hayward*, 117 N. Y. 487; *Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse v. Brooklyn Heights Railroad*, 185 N. Y. 520; *Matter of Friedman*, 136 App. Div. 750, affd. 199 N. Y. 537, *supra*; *Ward v. Orsini*, 243 N. Y. 123). In the case last cited, an eminent lawyer presented to this court for approval his printed contingent fee agreement in a case where he claimed the modest sum of $300.00, due to the settlement of an action without his knowledge or consent against the New York Central Railroad Company. The reasonable value of the legal services rendered was easily $300.00, which amounted to 50% under the signed retainer agreement. The opinion notes (p. 129) that "The defendant does not question the reasonableness of the fee." In writing for the court, Judge Pound was careful to avoid setting a precedent for other cases saying (p. 128): "It may well be that in a supposed case the amount received by the client would be so completely out of proportion to the value of the attorney's services that it would be unconscionable as matter of

law to permit him to enforce his contract."

In *Morehouse v. Brooklyn Heights Railroad* (*supra*, pp. 525-526), the court said:

> "An agreement to pay an attorney one-half of the recovery where the action was to recover a penalty of fifty dollards would not by any person be considered to be improper, but if it was for fifty thousand dollars it might be considered quite improper."

If the effect of the controversial portions of rule 4 is to provide for the disciplining of attorneys only where the contingent fee would be uncollectible in the full amount in an action between attorney and client under the general law of the State without reference to rule 4—which an analysis of the rule indicates that it is—the rule is not subject to attack on the grounds that it is parochial or that it violates § 474 of the Judiciary Law. It is no answer to this reasoning that Surrogates' Courts and courts dealing with infants' claims or other cases may be vested with greater power to rule on lawyers' fees than merely to decide whether they are so large as to be unconscionable.

Except for what is called the graduated fee schedule, it is improbable that anyone would take exception to what has previously been stated, any more than objection was taken in court to the rules requiring the filing of contingent fee retainers, the special deposit of moneys collected by way of settlement or judgment, the furnishing of detailed statements to clients or the preservation of attorney's records when rules concerning these were adopted in the First and Second Departments after the disclosures of the 1928 investigations (*Matter of Bar Assn. of City of New York*, 222 App. Div. 580; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149; *People ex-rel. Karlin v. Culkin*, 248 N.Y. 465, *supra*). Rules on those subjects prescribe in advance standards of conduct for attorneys in relation to their clients. There is no lack of power to do that, yet the reasoning of the opinions below would forbid it also. Rule 1-B of the First Department has long prescribed a standard of professional conduct directly respecting the compensation of attorneys, in that it prevents an attorney assigned as counsel for a defendant in a criminal case from accepting compensation except as authorized by an order of the court. That rule was attacked but was upheld in *Matter of Dresnick*, (2 A. D. 2d 521). Section 308 of the Code of Criminal Procedure does not expressly authorize the Appellate Division to promulgate Rule 1-B as respondents' brief indicates. It was done under the rule-making power. Rule 4-G makes a violation of the standards prescribed in the other special rules grounds for a finding of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law. There can be no objection to that.

Rule 4, *sub judice*, is essential in order to put on record the data necessary to be used as a foundation for taking disciplinary action. Even under plaintiffs' theory of action, no objection would lie against the rule if every lawyer filing a contingent fee retainer agreement were also required to file in his closing statement the amount of time he devoted to the case and an enumeration of the other facts underlying the elements enter into the value of the lawyer's services (*Randall v. Packard*, 142 N. Y. 47, 56). That would enable the court *after the event* and *in the individual case* to determine whether the lawyer was censurable for charging a contingent fee that was unconscionable as being out of all relation to the value of the work performed. The "fee schedule" in rule 4 dispenses with supplying that information where the agreed contingent fee is less than the percentages designated in the rule. If the stipulated fee is greater, the attorney is required to supply the information necessary on which to form a conculsion concerning the value of the professional services which have been rendered. This is merely supplying procedure whereby the lawyer may discharge his traditional burden of justifying his relations with his client where the circumstances prima facie call for explanation. Plaintiffs' objections reduce themselves to the fact that a declaratory determination is to be made regarding whether the amount of the contingent fee is censurable before rather than after the lawyer has received it. Rule 4 does not call for any determination until after the services rendered by the lawyer have been completed, nor even then unless the contingent fee exceeds the amounts in the schedule. The direction in the rule that the determination is to be made after the professional services have been completed is not without power, due

to the circumstance that the question of professional conduct is to be decided before rather than after the fee has been paid. Rules regulating professional conduct are "to prevent the continuance" of unworthy practices (*People ex rel. Karlin v. Culkin, supra,* p. 469). It is fairer and more considerate of the lawyer to determine the propriety of his conduct before he has received the fee.

If the consequence of the enforcement of this simple and practical disciplinary rule be to reduce the number of lawyers who are charging unconscionable contingent fees, that can furnish no basis on which to impugn the rule as a fee regulating measure. All regulation of improper practices has its consequences or should have in curtailing the practices. That is the purpose. The practice of charging unlawful fees is bound to be curtailed by the exercise of disciplinary powers, whether the fees are found to be unconscionable before or after they are paid.

Subdivision 2 of section 90 of the Judiciary Law (formerly numbered §88, subd. 2) is thus described in the opinion by Chief Judge Cardozo for the unanimous court in *People ex rel. Karlin v. Culkin, (supra,* pp. 471-472):

> " 'The supreme court shall have power and control over attorneys and counselors-at-law' (Judiciary Law, §88, subd. 2) The first Constitution of the State declared a like rule in terms not widely different. Provision was there made that 'all attorneys, solicitors and counselors at law hereafter to be appointed, be appointed by the court and licensed by the first judge of the court in which they shall respectively plead or practice; and be regulated by the rules and orders of the said courts' (Constitution of 1777, §27). What was meant by this provision that lawyers should be 'regulated by the rules and orders of the said courts?' Would the men who framed the Constitution of 1777 have been in doubt for a moment that a rule or order might be made whereby lawyers would be under a duty, when so directed by the court, to give aid by their testimony in uncovering abuses? We find the answer to these questions when we view the history of the profession in its home across the seas."

After describing the English origins of these provisions, Chief Judge Cardozo's opinion in *Karlin* summarizes the constitutional and legislative history in this State (p. 477):

> "With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declartory of a jurisdiction that would have been implied, if not expressed. The next Constitution, that of 1821, was silent as to the whole subject, containing no reference either to regulation or to appointment. Promptly, to avoid misapprehension, the Legislature passed a statute, the act of April 17, 1823 (L. 1823, ch. 182, §19), which continued in the same words the provision formerly contained in the Constitution of 1777. There was a revision of the statutes in 1827 (Act of Dec. 4, 1827), in which the provision was omitted, but the courts continued to act upon the theory that the power of regulation was either inherent or implied (*Matter of H.*, an Attorney, 87 N. Y. 521). The question does not now concern us whether the power may be withdrawn or modified by statute (*Matter of Cooper,* 22 N. Y. 67, 68). Instead of being withdrawn, it has been explicitly confirmed. In 1912, by an amendment of section 88 of the Judiciary Law (L. 1912, ch. 253), the jurisdiction was removed from the realm of implication. The earlier statutes were restored through a renewed declaration that lawyers are subject to the control and power of the court. We are back to the law as it existed in 1777."

These broad rule-making powers, so recently and explicitly upheld, are ample and flexible enough to include rule 4. The rule making power is not limited to prescribing only for the specific case after the event. The idea that imposition by lawyers on their clients, oppressive and unconscionable fee agreements or similar conduct is beyond the rule-making power of the court has no shadow of foundation. The idea is frivolous that disciplinary power over attorneys is unrelated to the exaction of excessive fees. Nor are the Appellate Divisions so helpless as to be denied the power of censure or of taking more

incisive disciplinary action to curb the practice of excessive exactions against clients merely for the reason that the client himself has not elected to contest payment of the fee. The duty and function of the Appellate Divisions to keep the house of the law in order does not hinge upon whether clients, worn down by injuries, delay, financial need and counsel holding the purse strings of settlement, knowing little about law or lawyers, have had the stamina to resist in court by hiring other lawyers to be paid out of the other half of the recovery for defending against the first lawyer. This is not a picture of the courts and Bar as a whole in their relation to the public, but it accurately describes enough so that it cannot be said that the Appellate Division, First Department, has directed its attention without cause to correcting this situation. The independence of the Bar is not at stake in this action, nor are the best interests of the profession served by growing public resentment engendered by what this rule is designed to prevent. While liability in the negligence field has been continually expanding and the size and proportion of recoveries has mounted in constantly increasing progression, the risk of the lawyer under contingent fee agreements has been reduced and his remuneration magnified. On top of this the percentages of the clients' recoveries which this segment of the Bar insists upon the right to retain has been enlarged until in this one Judicial Department over 60% of the 150,000 contingent fee agreements filed each year provide that 50% of the recovery shall be paid to the lawyer.

Aware that when the contingent fee reaches or approaches 50% it ceases to be a measure of due compensation for professional services rendered and makes the lawyer a partner or proprietor in the lawsuit, the Appellate Division has sought a means of investigating and checking what it deems to be an improper professional practice in the great majority of instances where it occurs. It cannot be held that reasonable and effective disciplinary action is not demanded in order to prevent the exaction of more than lawful charges in this huge field of controversy and litigation.

Where the amount of the claim is small, as the preamble to rule 4 states, the percentage charged may be greater than where the recovery is larger without rendering the fee unlawful. As a practical approach the rule sets forth a tentative schedule, subject to variation if the facts warrant, characterizing as unreasonable and unconscionable the collection of contingent fees in excess of 50% on the first $1,000 of the sum recovered, 40% on the next $2,000, 35% on the next $22,000, and 25% on any amount over $25,000 of the sum recovered.* The preamble states that the court considers that ample compensation for the best efforts and services of competent counsel will ordinarily be provided by the schedule. It is not necessary to take judicial notice that it does so in most instances, for the reason that plaintiffs have not disputed for the purposes of the action that the rule is fair, responsive to the ethical and moral standards of the community and serves professional and public interest. Moreover, what is of the utmost importance, these schedules are merely presumptive of what constitutes an exorbitant contingent fee in a particular case. The way is left open in any case to an attorney to come into court on a full showing of all the facts and circumstances, with opportunity to establish that these prima facie percentages do not indicate correctly that the stipulated contingent fee in his case is unlawful due to being unconscionable. The effect is to make a record in the individual case, to determine by the very *ad hoc* procedure which plaintiffs assert is the way to attack the problem, after the work of the lawyer has been finished, whether the contingent fee claimed is lawful or unconscionable—that is to say, whether it is in such an amount as to be collectible in an action between attorney and client on the contingent fee retainer agreement. The language of the rule bears no token of an intention to censure the lawyer unless the charge to the client is so large in amount as to be uncollectible as between attorney and client. The scheduling of the graduated scale of percentages in the rule, fair as these precentages are conceded to be for the purposes of the action, concludes nobody. They are simply a procedural means of avoiding the necessity of calling upon every lawyer who files a contingent fee agreement to show what he has done in the case as a basis for determining whether the fee agreement is exorbitant. Plaintiffs have not denied that it is within the power of the Appellate Division to call on all lawyers who have

*Or, as an alternative, in excess of 33 1/3 % of the sum recovered.

collected contingent fees to do exactly that. They could not deny it in the face of the decision by this Court in *People ex rel. Karlin v. Culkin* (248 N. Y. 465, *Supra.*) The matter here claimed to be wrong about the rule is that it calls upon the lawyer to make this showing (if his contingent fee exceeds the scheduled precentages) before rather than after collection of the fee. It could not be denied, even on plaintiffs' theory of the case, that excessive exactions by lawers from their clients is a proper subject for investigation and desciplinary action. Unless the work were shortened by presuming that fees within specified limits were lawful, the volume of the task would be too great for any court effectively to perform. By the fee schedule the rule sifts out all except those to which special attention need be given. Some of those will prove to be legitimate and others illegitimate. They will not be branded either way even if they exceed the scheduled percentages, if the lawyer has made special application under the rule, until the court decides, and the attorney will not be censured unless he accepts a fee in an amount which has been found to be unconscionable.

There is no reason on account of which the Appellate Division could not proceed by this practical and equitable rule to attack this insistent problem. If a lawyer believes himself to be entitled to contingent fees in excess of the scheduled percentages, he can provide for them in his contingent fee contract without infraction of the rule, by stating in the retainer agreement that he believes in good faith that the scheduled percentages because of special or extraordinary circumstances will not give adequate compensation, and that application for greater compensation within the amounts provided by his contingent fee agreement will be made to the court at the conclusion of the litigation or on the settlement of the claim. The preamble to rule 4 acknowledges that the court "recognizes the possibility that extraordinary circumstances may exist in a particular case which would make the resulting compensation inadequate. The court will make special allowance in such cases and grant an application for larger compensation."

These scheduled percentages are, then, of merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law (*Wadsworth v. Delaware L. & W. R. R. Co.,* 296 N. Y. 206, 212). It lay within the competence of the First Department under section 83 of the Judiciary Law to adopt rule 4 as a procedural aid in rendering effectual its disciplinary power over attorneys in the case of unlawful contingent fees. The so-called fee schedule merely determines where the burden of proof shall lie in the determination of the censurability of contingent fees in the individual case. Neither plaintiffs nor any segment of the Bar have a vested interest in the exaction of unlawful fees, which is all that this rule is fashioned to prevent, nor can they be heard to say that the Appellate Division is precluded from taking preventive measures for the reason that the client has decided not to litigate the fee. The contention that this is a fee-limiting measure is reduced to an argument that lawyers cannot be disciplined for accepting fees which would be uncollectible in court, if the client defended on the ground that they are so out of proportion to the value of the work as to be unconscionable.

The rule making power of the Appellate Divisions in exercising their long standing "power and control over attorneys and counsellors at law and all persons practicing or assuming to practice law" (Judiciary Law, §90, subd. 2) has always been adapted to the exigencies of the times and to the ingenuity of lawyers who are trying to sail too close to the wind. We think that it extended to the adoption of rule 4. In view of the existence of subdivision 2 of section 90 of the Judiciary Law, it is not necessary to decide whether, as part of the Supreme Court which is vested by the Constitution with general jurisdiction in law and equity (N. Y. Const., art. VI, §1), the Appellate Divisions possess similar powers over attorneys apart from statute.

The judgment appealed from should be reversed, and declaratory judgment entered in favor of the defendants and against plaintiffs, without costs.

JUDGE BURKE'S DISSENT—

The majority opinion suggests that we are to determine the question of the power of the Appellate Division, First Department, to promulgate rule 4 in the light of the concession by plaintiffs herein that the rule is reasonable, necessary and serves to advance the status of the profession. This reasoning is derived from a statement

in the affidavit of one of the plaintiffs that the necessity and reasonableness of the rule are not in issue on this appeal. This statement is not, in terms, a concession, but was offered, as the affidavit states, solely for the purpose of limiting the issues in the action.

The sole issue before the court now is one of authority. However, since the majority finds it incumbent to defend the reasonableness of the rule, and its necessity, we should look into it with some degree of particularity.

The majority maintains this position despite the conclusions of Mr. Justice Wasservogel, who, in reporting on the hearings held in connection with the rule, found that it was not necessary. Certainly his finding is not without basis in fact. Indeed, we find ample support for his position in the very records of the Appellate Division, First Department, itself. That court, as the preamble to rule 4 duly notes, has been opposed to contingent fee retainer contracts which provide that the fee shall be 50% of the recovery. As early as 1950—by the very admission of the Appellate Division, First Department, that court regarded such an agreement unconscionable per se (*Buckley v. Surface Transp. Corp.*, 277 App. Div. 224). Yet in the 10-year period 1949-1958 inclusive, when the number of lawyers practicing in the First Department increased sharply, the number of attorneys subjected to disciplinary action each year averaged but 14 in number. In the preceding 10-year period, the average number of attorneys subjected to disciplinary proceedings was 27.4 each year. Few, if any, attorneys were disbarred, suspended, censured or struck from the rolls because they had provided services in return for contingent fees in excess of 33-1/3 percent of the amount of recovery.

Comparing the 1949-1958 period with the preceding 10-year period, we find that while the average number of contingent fee retainer contracts filed each year has doubled the average number of attorneys disciplined has been decreased by one-half. The ratio is revealing; disciplinary proceedings have decreased in inverse proportion to the increase in the number of retainers filed. Indeed, the number of attorneys disciplined for extracting unconscionable fees have been so few in number, that they are included in the records of the Appellate Division, First Department, concerning disciplinary matters under the heading, "Miscellaneous".

Surely, we must assume that the First Department was not derelict in its statutorily mandated duty to discipline attorneys whose actions that court regarded as unconscionable or unreasonable. These contingent fee retainer agreements were filed with the Clerk of the First Department; the contracts were readily available for the scrutiny of the court. Under subdivision 2 of section 90 of the Judiciary Law, the Appellate Division need not have waited until a dissatisfied client protested the attorney's fee. That court admittedly has the power to initiate proceedings, *sua sponte*, in individual cases where it regarded the fee charged to be unconscionable. Since we must assume that the First Department has discharged its duty to the People of this State as well as to the members of the Bar, we can only conclude that the disciplinary action in this area, infrequent though it might have been, was sufficient to meet the threat imposed by attorneys filing such contingent fee retainers.

To sustain the necessity of the rule, we are told that upwards of 150,000 contingent fee retainers were filed annually during the 10-year period, 1949-1958, and that approximately 60% or 90,000 agreements provide that the fee shall be 50% of the recovery. But the actual fees received by attorneys which may be found in the closing statements required to be filed by the First Department, are not disclosed. There are no statistics to show the percentages reserved as attorneys' fees on actual recoveries. The number of closing statements filed each year is about 50,000. The differential between the number of closing statements and the number of retainers filed annually indicates that in many instances no settlement is reached, no recovery is had, and no fee is retained. One would imagine that, to obtain a true picture of the amount received by attorneys under contingent fee retainers, one should look at these closing statements, which would show actual figures, rather than the retainer agreement itself, which contains little information but does serve to inform the court that a claim has been asserted, and that a particular attorney has agreed to pursue the claim for a stipulated percentage of the recovery, if any.

Hence, an unbiased, objective appraisal of the relevant factors indicates that there

is a singular lack of evidence to show the necessity of the rule. Similarly, the reasonableness of the rule is open to question. Attorneys, as everyone else in this country, have been subjected to inflation. But it is argued that plaintiffs' verdicts have similarly increased and hence, contingent fees are much too high. The American Bar Association, however, has published studies indicating that compensation for attorneys has not increased correspondingly over these inflationary years as has the remuneration of other professions as medicine and dentistry. Also ignored is the fact that the courts themselves have additionally increased the burgeoning costs of an attorney by requiring him to file innumerable papers to serve the orderly administration of justice.

The rule fails to consider that an attorney, without initial cost to a client, makes available to that client his talents, his office facilities and his secretarial assistance to process the client's claim. An attorney may not be a partner in the claim, but he assumes a great risk in processing the claim. His money and time, which he has expended, may produce no return.

Rule 4 here fails to take into account, at the very beginning, that the case may be tried and retried, that appeals may be taken, before a judgment may be collected. And in some instances, after all these services have been rendered, there is no money judgment for the plaintiff. These are the hazards which an attorney assumes when he accepts a client on a contingent fee basis. How can a court be so omniscient to state that, at the outset, before the greater part of the work has been done, that a particular percentage is unreasonable under any and all circumstances? Under some circumstances, it is quite conceivable that a contingent retainer fee of 33-1/3% of the recovery may be unreasonable. It may very well be that fees in excess thereof should be the exception rather than the rule. But the reasonableness of the fee—regardless of the percentage chosen—can only be determined in an *ad hoc* proceeding, after the event.

But the reasonableness of the rule, and the necessity of the rule are not in issue here. And rather than base this opinion—as has the majority based its opinion—upon an assumption which is rebutted by all the factual data in the Appellate Division archives, we examine the power to enact the rule not in the light of necessity and reasonableness, but from the history which has culminated in the acceptance of this rule by only one of the four departments of the Appellate Division.

The hearings held immediately prior to the promulgation of rule 4 did not consider the power of the Appellate Division to promulgate the rule, but dealt with its necessity. But other committees, formed on other occasions, have considered this question. Their conclusions that the courts do not have this power to regulate attorneys' fees, while not conclusive, nor binding upon this court, are certainly persuasive authority, and are entitled to great weight. (Association of Bar of City of New York Reports, Vol. 65, Set D No. 475 [1938 Annual Reports, pp. 295-296]; Vol. 80, No. 649 [1943]; Bronx County Bar Assn. Report in Library, Assn. of Bar of City of New York, fol. n p 1940 in folio pam. v. 245; 31 N. Y. State Bar Assn. Rep. 121 (1908).

The Association of the Bar of the City of New York, which has before this court so militantly and ably defended the power of the Appellate Division to promulgate this rule, had concluded after investigation, hearings and mature thought not once, but at least twice, that the court's power to regulate contingent fees was circumscribed by law. In 1938, a special committee of that honored association, in its reports, after discussing the proposition that "there is little practical scope left for the argument that the courts retain any power in this field, apart from fraud and over-reaching" further stated: "However that may be, the lines of judicial and legislative doctrine are too firm by this time to sustain the hope of successful modification by the judiciary alone. There is definite and unquestioned need for a new deposit of authority in our courts, and this deposit of authority must come from legislation." (Annual Reports of Association of Bar of City of New York [1938], pp. 295-296.)

And again in 1943, another committee of the Association of the Bar reviewed the problem. And again the committee concluded that the broad scope of section 474 of the Judiciary Law imposed restraints upon judicial regulation of contingent fees. And again the committee suggested remedial legislation: "We can only point the way in the hope that the legislature, where many of our professional brethren labor, may also recognize the evil and give to the courts the power to apply

some remedy." (Association of Bar of City of New York Reports, Vol. 80, No. 649 [1943].)

This view—that the power to regulate contingent fees is not vested in the courts — is not new. Indeed, as far back as 1908, a committee of the State Bar Association deplored the abuses of the contingent fees by attorneys and recommended that control of such fees be specifically vested in the courts. (31 New York State Bar Assn. Rep. 121). The Legislature, however, rejected this proposal. (Annual Reports of Association of Bar of City of New York [1938], pp. 295-296.)

The report is significant in that it clearly demonstrates that under the statutory law of this State which in this area has remained unimpaired since that time—there was a recognition that courts did not have the power to regulate fees. Further, it is also significant since it shows that the Legislature did not think that there were abuses, or that the courts should regulate fees. And this has been the thinking of the Legislature, since that time, for they have continually rejected such bills as would vest power in the courts to regulate contingent fees (see, e. g., N. Y. Senate Bill, Sen. Int. No. 419, Print No. 457, 1941 Sess.)

Special Term and the unanimous Appellate Division, Third Department, have similarly found rule 4 to regulate fees, and have similarly concluded that the Appellate Division, First Department, lacked the power to enact such a rule.

The majority opinion states: "The Appellate Division, Third Department, and Special Term have both started with the assumption that rule 4 threatens disciplinary action against lawyers who make retainer agreements with their clients that would otherwise be valid and enforceable under section 474 of the Judiciary Law. It follows from this false premise that the effect of rule 4 is to regulate fees of attorneys differently from the way in which they are regulated by statute. We find no basis for this assumption in the language of the rule, in its preamble, or in the evil which it proposes to remedy. The rule does not touch lawyers' fees except such as would be unforcible in any event under section 474 of the Judiciary Law."

The false premise to which the majority refers is not the threatened disciplinary action, for rule 4 obviously exposes any attorney, charging without court permission, a contingent fee in excess of the schedule set forth to disciplinary action. The false premise, according to the majority opinion, upon which the courts below rested their decisions, is that rule 4 prohibits contracts which are unenforceable under section 474 of the Judicial Law, which states that "(t)he compensation of an attorney *** for his services is governed by agreement, express or implied, which is not restrained by law". The majority says that this assumption is not true. Or rather, it assumes that there is no basis for this assumption. The rule procribes fees in excess of 33-1/3% of the amount of recovery. Yet there are cases in this court, of which the majority is aware because it has cited them continually to sustain its position, where this court has sustained a 50% contingent fee! (*Ward v. Orsini*, 243 N. Y. 123; *Morehouse v. Bklyn Heights R. R. Co.*, 185 N. Y. 520; *Matter of Fitzsimmons*, 174 N. Y. 15, 23-25).

The only basis upon which the majority can sustain its decision is this: "If the rule is limited, as we interpret it, to making provision for disciplining attorneys for receiving more from their clients than could be legally collected against them under retainer agreements even with the aid of section 474 of the Judiciary Law, the judgment appealed from is without foundation."

This belated attempt to harmonize rule 4 with section 474 of the Judiciary Law does not survive analysis. As we have shown, the cases indicate that a 50% contingent fee may be enforced, under section 474 of the Judiciary Law; it may not be enforced under the present rule 4, unless prior approval of the First Department is obtained. A court cannot predict a priori the reasonableness of a fee to be charged in the event of recovery, where there has been no recovery, and, indeed, where there has been little work done in processing the claim.

We cannot conclude that the rule describes as censurable conduct that which has always been censurable. If it has been previously clear that contingent fees in excess of the recommended schedules were censurable there would hardly be need for the Appellate Division to hold extensive hearings and promulgate a merely repetitive rule. Further, the premises that the rule proscribes conduct by attorneys which has always been censurable is belied by the fact that only in rare instances

has the First Department censured attorneys for such conduct.

There is another evil inherent in this type of rule. The power to promulgate the rule necessarily implies the power to amend the rule. Admittedly, the Appellate Division, First Department, totally lacks the power to promulgate a rule which states that any percentage agreement would be unreasonable, since this would clearly contravene section 474 of the Judiciary Law —even if attorneys were granted the privilege to have their compensation fixed by a court upon proper application. While it does not seem likely that the First Department would test the extent of its power to that extreme, it can conceivably lower its present recommended schedule of fees to such a lower percentage that it would not be economically feasible for attorneys to enter into such contingent fee contracts. The other equally unpalatable alternative for attorneys would then be to contract for fees in excess of the prescribed rates and face the certainty of disciplinary action.

The innate mischief of the rule, and the conclusion that it does, in fact, fix fees, is apparent when the rule is carried to its logical extremes. Why, for instance, is a contingent fee of 33-1/3% of the recovery fair and conscionable under all the circumstances, but a contingent fee of 34 % unfair and unconscionable under all the circumstances? The reasonableness of the fee is not determined solely on the amount charged, but also by the quality of the services rendered in light of the circumstances of the particular case. (*Ward v. Orsini,* 243 N. Y. 123, *supra*; *Matter of Friedman,* 136 App. Div. 750, affd. 199 N. Y. 537; *Morehouse v. Brooklyn Heights R. R. Co.,* 185 N. Y. 520, *supra*; *Matter of Fitzsimmons,* 174 N. Y. 15, *supra; Barry v. Whitney,* 3 Sandf. 696.)

Since then the premise that rule 4 prohibits contracts which would be enforceable under section 474 of the Judiciary Law is correct, as I have attempted to indicate, it follows that rule 4, in effect fixes contingent fees. To conclude otherwise, from reading the rule, would be sheer sophistry.

Rule 4, as we have shown, conflicts with section 474 of the Judiciary Law. From this statement, several corollaries may be derived. The first is that the Appellate Division, First Department, may not promulgate a special rule in contravention of a specific statute even under the grant of power under section 83 of the Judiciary Law. (*Chase Watch Corp. v. Heins,* 284 N. Y. 129; *Moot v. Moot,* 214 N. Y. 204; *Ackerman v. Ackerman,* 123 App. Div. 750, affd 200 N. Y. 72; *Glenney v. Stedwell,* 64 N. Y. 120.) Another corollary is that in usurping power not granted to it by the Legislature, the court has enacted legislation contrary to the method prescribed by the State constitution.

Further, the rule changes the substantive law of the State for one particular group of lawyers practicing in one particular area of the State. In *Matter of Mayor of City of New York.* (19 Barb. 588) local rules of the General Term of the Supreme Court in the First Judicial District, permitting the court to fix attorneys' fees in street opening proceedings were held to be void. The court said (pp. 491-492) that the rules, if legal, "are general rules applicable to all cases of like character. Therefore, the general term in a district had no legal power to make them; for which reason, those rules are void and nugatory."

Rule 4 suffers from the same infirmity. If legal, it should be applicable to all cases of like character, not only to cases where the attorney has his office in the First Department, or to cases which are tried in the First Department. Hence, the Appellate Division, First Department has no power under section 83 of the Judiciary Law to promulgate this "special rule". Hence, lawyers in one part of the State may seek enforcement of a contingent fee retainer in the courts of law but, in the First Department, an action may not be brought if the compensation provided for in the agreement exceeds the limits provided for in rule 4. Such discrimination between citizens of the State with regard to their access to our courts is a violation of the due process and equal protection clauses of the State and Federal Constitutions. (See *Gregonis v. Philadelphia & Reading Coal & Iron Co.,* 235 N. Y. 152, 159.)

The judgment appealed from should be affirmed, without costs.

JUDGE FROESSEL'S DISSENT—

I concur with Judge Burke for affirmance. Much has been said in this case that is completely irrelevant to the sole issue presented, namely: Did the Appellate Division of the First Department have the *power* to adopt rule 4 insofar as it provides that contingent fees equal to or less than the percentages fixed by it are "fair

and reasonable", whereas those in excess "shall *constitute* the *exaction of unreasonable and unconscionable* compensation"? (Emphasis supplied.)

At the outset it may be noted that the very body charged by law (Judiciary Law, § 90) with disciplining attorneys has created by its own rule a presumption of guilt of unconscionable conduct, in the nature of a prior restraint, contrary to the express provisions of section 474 of the Judiciary Law. The challenged rule is not one of procedure. It interferes with the freedom of contract and impairs the obligation of existing contracts between attorneys and their clients, based upon arbitrary fixing of percentage fees, as to the amounts of which in many cases reasonable men might disagree.

We are not concerned here with what Edward I did with the courts and lawyers in 1292, for he assumed to regulate the lives of all his subjects. We live under an entirely different form of government today, under a written Constitution with its three separate branches of government (U. S. Const., arts. I, II, III; N. Y. Const., arts. III, IV, VI), each operating in its own sphere. And a court's first duty is to obey the law itself, no matter how well-intentioned it may be in effecting a change.

From the earliest days, the Legislature of this State has exercised exclusive power with respect to attorneys' fees. In 1848, all statutes regulating the fees of attorneys or "restricting or controlling the right of a party to agree with an attorney *** for his compensation" were abolished. It was then provided that "The measure of such compensation shall be left to the agreement, express or implied, of the parties" (L. 1848, ch. 379, §258). In 1876, the precise language of the first clause of what is now section 474 of the Judiciary Law was adopted, namely, "The compensation of an attorney or counsel for his services is governed by agreement, express or implied, which is not restrained by law" (L. 1876, ch. 448, § 66).

In 1908, after an investigation into the abuses of contingent fees, the New York State Bar Association recommended an amendment of the law to allow a court to pass upon the reasonableness of contingent fee contracts in negligence cases and to reduce the attorney's compensation when it was found excessive (31 New York State Bar Association Rep. 105-106, 136). This proposal was rejected by the Judiciary Committee of the Assembly, which thought it was an effort "to invade a constitutional right" between lawyer and client (32 New York State Bar Association Rep. 194). In 1938, as Judge Burke points out, a committee of the Association of the Bar recognized that "this deposit of authority must come from new legislation". (Annual Reports of Association of Bar of City of New York [1938], p. 296.)

The case law under section 474 of the Judiciary Law clearly indicates that the function of the court is to determine whether the facts surrounding the agreement in any given case show that the attorney took advantage of the confidential relationship or perpetrated a fraud upon his client (*Rodkinson v. Haecker,* 248 N. Y. 480, 488-490; *Ward v. Orsini,* 243 N. Y. 123, 127-128; *Matter of Reisfeld,* 227 N. Y. 137, 140; *Ransom v. Cutting,* 188 N. Y. 447, 450; *Morehouse v. Brooklyn Hts. R. Co.,* 185 N. Y. 520, 526, reaffd. after new trial 123 App. Div. 680, affd. 195 N. Y. 537; *Matter of Fitzsimmons,* 174 N. Y. 15, 23-24; *Matter of Peters [Bachmann],* 271 App. Div. 518, 523, mod. on other grounds 296 N. Y. 974; *Matter of Sasson,* 231 App. Div. 524, 526; *Matter of Liebergall,* 189 App. Div. 681, 684; *Matter of Lessig,* 165 Misc. 706, 708 [in which the attorney claimed that an agreement was unconscionable to *his* disadvantage]).

In the absence of such showing, we have repeatedly held that under section 474 of the Judiciary Law the measure of an attorney's compensation is fixed by his agreement with his client, unless otherwise provided by law (as, e. g., in Judiciary Law, § 474 (as to infants); Surrogate's Court Act, §231-a; Real Property Law, §§122, 122-a; General Corporations Law, §§63-68; Workmen's Compensation Law, §142 subd.) and that a court may not disregard that agreement and substitute its own judgment as to what it believes to be the appropriate compensation for the attorney's services. Nevertheless, the majority is now approving a rule of the Appellate Division which in effect overrules our decisions.

There is neither constitutional nor statutory authority for the enactment of rule 4. While section 83 of the Judiciary Law provides that "A majority of the justices of the Appellate Division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such

department", this may only be done when "not inconsistent with any statute or rule of civil practice". By the same statute, the Justices of the Appellate Division are empowered to amend the Rules of Civil Practice only if "not inconsistent with any statute". When the Legislature declared that the compensation of an attorney for his services is governed by agreement, express or implied, which is not restrained by law, the Appellate Division had no right to enact a rule to the contrary, at the same time creating a presumption of guilt of unconscionable conduct because a lawyer may have contracted for a larger percentage (such as 35% or 40%) than the rule prescribes as reasonable for his services in a personal injury action.

A great deal is said in the prevailing opinion and in appellant's brief about the desirability of rule 4, but, as I have already indicated, these considerations are completely irrelevant in our determination of the Appellate Division's power. In McKinney's Consolidated Laws of New York (Book 1, Statutes, § 73, p. 110), "Avoidance of judical legislation", it is said (citing numerous cases): "The Constitution of this state vests the legislative power in the Senate and Assembly (N. Y. Const., art. III, §1), and that the courts may not divest or usurp this power has been announced so frequently and in such varying language as to defy complete repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare, and enforce the law; not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature, the Judiciary cannot avoid its duty."

Whether such usurpation of power is effected by rule or by the interpretation and construction of statutes, the result is the same. Section 474 and its predecessor have been on the statute books for well over a century and, despite efforts to secure an amendment thereof, the Legislature has thus far declined to make a change. This does not authorize the courts to usurp its power, for to "supply omissions transcends the judicial function" (*Iselin v. United States,* 270 U. S. 245, 251). "A plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the Legislature; we may not usurp its functions by legislating judicially (*United States v. Carolene Products Co.,* 304 U. S. 144)" (*People v. Friedman,* 302 N. Y. 75, 79); and " 'Nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.' (*Carter v. Carter Coal Co.,* 298 U. S. 238, 291)". (*Matter of Fink v. Cole,* 302 N. Y. 216, 225.)

The judgment appealed from should be affirmed, without costs.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

Low Back Pain*

CARROLL B. LARSON**

Iowa City, Iowa

I HAVE been interested in low back pain for many years and, indeed, have been a fellow sufferer. If I say anything which sounds new, it will only prove the definition that originality is nothing but undetected plagiarism.

CARROLL B. LARSON

Importance of Roentgenograms

The cartoon in figure 1 is shown to emphasize the need for x-rays in cases of low back pain. I think anyone who has a back problem should have an x-ray. Even though you may anticipate that it will be normal, it is still worthwhile from the standpoint of having a common base from which to start; there may be a recurrence of the backache later, and you will then know what changes have or have not occurred.

Most backaches are due to mechanical derangement of the spine.

An x-ray should always be made to rule out disease and establish a base for evaluating present and future degenerative changes.

Physiologic degeneration of intervertebral disks can produce pain, especially if there is concomitant instability.

Spondylolisthesis produces pain only if the underlying disk deteriorates.

Ruptured disk is not the major problem in low back pain, and operation is not mandatory in all cases.

Incorrect posture can lead to back pain and prevent the natural healing process.

The most important reason for taking an x-ray is to rule out disease, e.g., metastatic disease, infection, tuberculosis, rheumatoid arthritis. An example of how the simple taking of an x-ray frequently can rule out disease is illustrated in figure 2. The patient came to see me because he had a so-called ruptured disk, and was sent in for an operation. The x-ray of his lumbar spine shows some degenerative changes, hypertrophic lipping, and some loss of density of bone, but actually not of such a degree that one would suspect any-

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Presented before the forty-third annual Assembly of the Interstate Postgraduate Medical Association at Cleveland.

thing serious. Further x-rays were made, and figure 3 illustrates the marked erosion that had occurred in the inferior necks of the femora. The case turned out to be one of multiple myeloma. We did not have to investigate further from the standpoint of a ruptured disk, so the x-ray in this instance was extremely helpful.

Similarly, in figure 4 you can see that one sacro-iliac joint is gone. Something is going on here—rheumatoid arthritis, tuberculosis—and the idea I am trying to put across is that you must run down the diagnosis after you know there is something wrong in the x-ray.

After you have ruled out disease processes by means of x-rays (and keep in mind that metastatic disease or infection may not be apparent on x-rays until the patient has had three or four months of continuous pain), then the x-rays will be meaningful to you. Assuming that disease has been ruled out, I will get right to the crux of the problem and say that I think by far the majority of backaches, the "garden variety" you see day after day, are due to mechanical derangement of the spine.

Stability and Instability of the Spine

Figure 5 illustrates sagittal sections of the spine, with the disks bulging because they have an intrinsic turgor with pressure. An intervertebral disk has, as one of its functions, the pushing apart of two adjacent vertebrae. It will push these vertebrae apart as far as the anterior-posterior and circumferential ligaments between them will allow. This means that the spine at that segment or that unit is kept under tension. This is the stability mechanism of the spine. If you strip all the muscles and other ligaments away, leaving only this unit holding the spine from the sacrum, it will remain upright due to this stabilizing mechanism of the disk unit.

We know that at the age of 21 years most of us begin to deteriorate as far as the intervertebral disks are concerned. Degeneration is a physiologic process. It occurs in everyone to a greater or lesser degree. If great, the process becomes symptomatic and begins to cause low back pain. Aside from physiologic deterioration, what other factors precipitate

FIGURE 1. *"One more dance, and if he is still in pain we'll have to x-ray."*

or aggravate this degeneration? One is the mechanics applied to the spine, the force applied to the disk areas. If excessive, it produces cracks in the cartilaginous annulus that surrounds the disk, and fluid is absorbed. The disk loses its intrinsic expanding capacity and settles down, and as it does so it changes the mechanics of the spine. It is this change which I think accounts for most cases of back pain.

I have described the normal stability of the spine and how failure of the stable mechanism results in instability. Figure 6 is a diagrammatic representation of what I mean by instability. Normally when a vertebra moves backward or forward on the vertebra below it, it does so through the disk in a sort of rolling motion. If the disk is deteriorated, at times this rolling motion is lost and there is backward or forward sliding of one vertebra on top of the other in motion. This I should like to term instability as the result of a degenerated disk. When this instability occurs it causes pain, and it accounts for a great number of the pains we encounter in the common problem of low back pain.

Mechanisms of Pain in Degeneration

There are three ways, I think, in which degeneration produces pain. One is by referred

FIGURE 2. X-ray of lumbar spine of patient referred for operation for "ruptured disk."

FIGURE 3. Same case as figure 2. Marked erosion in inferior femoral necks. Patient had multiple myeloma.

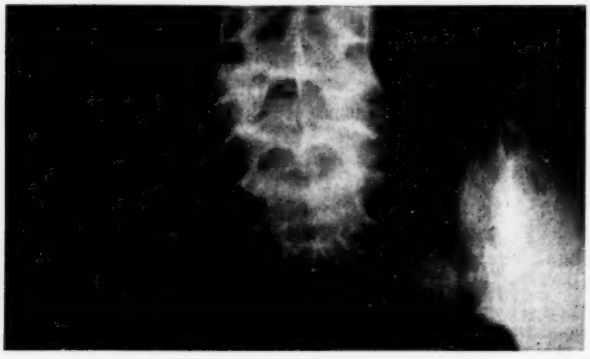


FIGURE 4. Sacro-iliac deformity in patient with low back pain emphasizes the importance of x-rays in diagnosis.

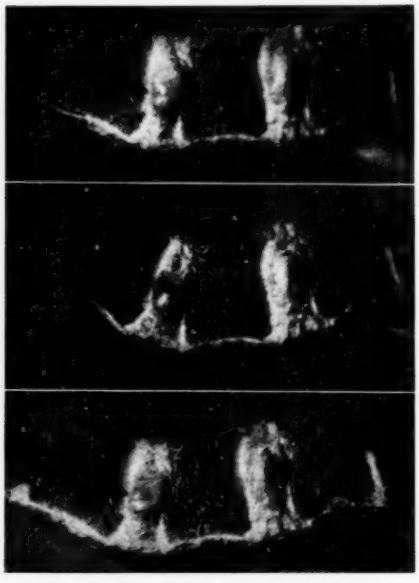


FIGURE 5. Sagittal sections of the spine. Disks bulge because of intrinsic turgor with pressure.

FIGURE 6. Diagrams depicting instability of the spine resulting from disk degeneration.

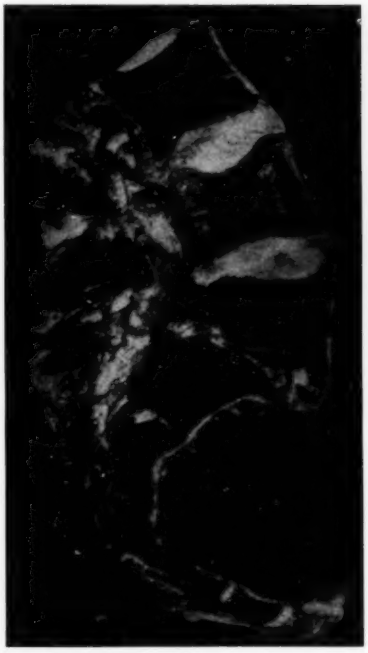


FIGURE 7. Deteriorated disk in an intervertebral area of spondylolisthesis.

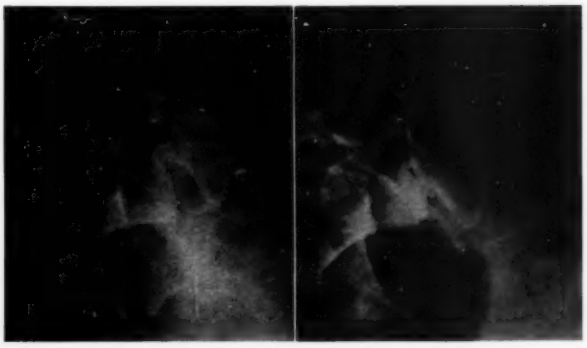


FIGURE 8. Spondylolisthesis was an incidental finding when the film on the left was made; patient was asymptomatic. Ten years later the patient had back pain, and the film on the right was made.

pain. The annulus fibrosus has nerve fibers in it; the ligaments have nerve fibers. When inflammation is present (incident to nature's attempt to heal this degenerative process), this inflammation is the afferent stimulus to pain. It goes into the spinal cord and comes back out on a referred pattern of the same nerve segment. The referral frequently is down the leg, simulating sciatica, but this is not true sciatica. The second pain mechanism is true radiation. The nerve root itself has been impinged upon, either by the body of the vertebra above pinching it as it moved backward or by excessive bulging of the remainder of the degenerated disk. This type of pain has a true segmental distribution. You can follow it according to the anatomy book. This is true radiation pain; this is nerve root pain. It means something as far as localization of the lesion is concerned. The third type of pain, which is so confusing to most of us, is pain in the muscles themselves. The muscles are painful because they are in spasm, attempting to stabilize the unstable spine. If you make a fist for 20 minutes, as hard as you can, your arm will ache. This muscle spasm accounts for a great part of the ache in backache, and a very easy remedy is to provide the spine with a little support so that nature's own muscular apparatus does not have to provide the necessary stability.

Spondylolisthesis

Spondylolisthesis, the most common condition affecting the back, occurs in about 5 per cent of the total population. In itself it frequently is not painful. It becomes painful when and if the underlying disk deteriorates. Figure 7 is a photograph of a pathologic specimen of such a deteriorated disk in an intervertebral area of spondylolisthesis. The condition was very painful because of instability, not because spondylolisthesis was present; in other words the pain in spondylolisthesis is identical to all the other types of low back pain when due to degeneration of the disk.

Figure 8 shows two x-rays in such a case of spondylolisthesis. The one on the left was made when the patient was asymptomatic. The spondylolisthesis was an incidental finding. Ten years later I saw the patient because of back pain, and the x-ray on the right was taken.

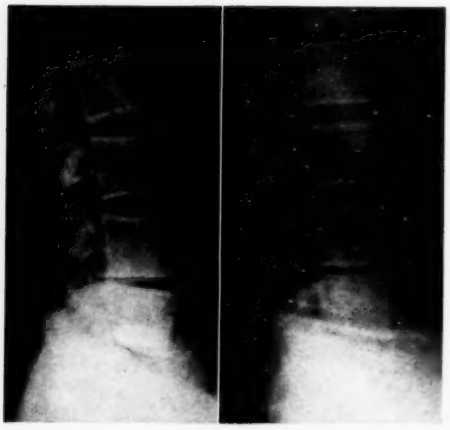


FIGURE 9. Deterioration of disk in absence of spondylolisthesis.

The only difference is a marked narrowing of the disk.

Figure 9 shows the type of deterioration of a disk that can occur in the absence of spondylolisthesis: narrowing of the disk, and spur formation at the anterior margin of the bodies of the vertebrae, of the contiguous disk. These are signs of deterioration at that level. They can be physiologic and can occur without producing symptoms, if concomitant instability is not present. Recently I saw an x-ray of a 70 year old woman who had marked changes like these at four or five levels, without back pain. On the other hand, minor degrees of the same type of change can be painful if there is additional instability.

Ruptured Disk

Figure 10 is a diagram of a ruptured disk, which, I should like to state, is purely an incident in the life of a deteriorated disk. I doubt if you can rupture a normal disk; it has been attempted many times experimentally. If a disk is deteriorated and if abnormal pressures are applied to it, a portion of it can be ruptured backward, producing true radiation pain. This actually occurs in a very small number of degenerated disks, so it is not the major problem in regard to low back pain.

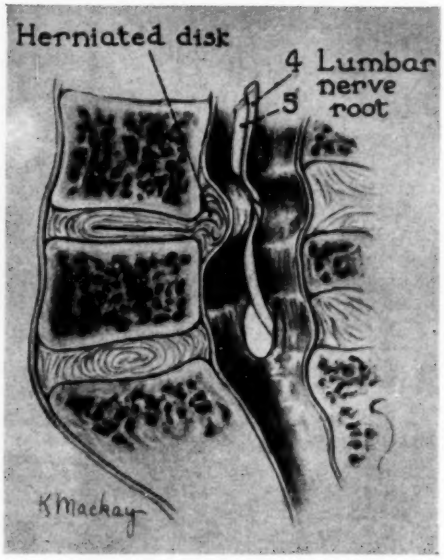


FIGURE 10. Diagram of ruptured intervertebral disk.

Relation of Posture to Back Pain

In the management of back pain, the only factor I know of that we can control medically is the incident strain to the area of a disk which has already deteriorated physiologically. If we can prevent strain in this area, to start with, or prevent further strain once degeneration has occurred, we can control the symptoms. This is why back pain is not a disease. It is purely a symptom, and we are attempting to control only the symptom, not the underlying deterioration.

It is obvious from the drawings in figure 11 that posture has something to do with intervertebral tension. If a patient has a deteriorated lumbosacral disk and bad posture, as indicated in the center drawing, undoubtedly there is more strain incident to that disk level than there normally would be. This, then, can become productive of pain. So far as I am concerned, posture is a very important issue. I doubt if poor posture will necessarily produce pain unless deterioration of one of the disks sets in. We then should correct posture

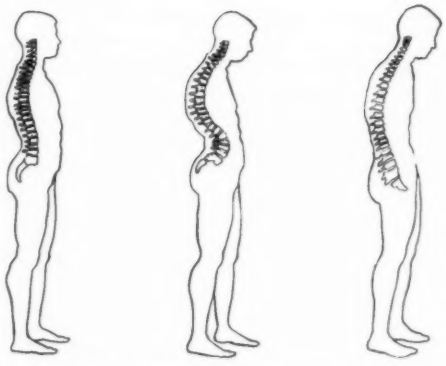


FIGURE 11. Posture is an important factor in the development of intervertebral tension and the production of pain in the presence of disk deterioration.

as far as possible, to put one brick (vertebral body) on top of the next brick rather than having them off at a sheering slant.

Sitting becomes an important issue to a person who has chronic back disease, because if he continues to move and strain the degenerated area nature has little opportunity to heal the process. And nature does heal it, by fibrosis of the surrounding ligaments, mainly; but if the area is continuously moved and strained, nature's fibrosis does not produce this cure.

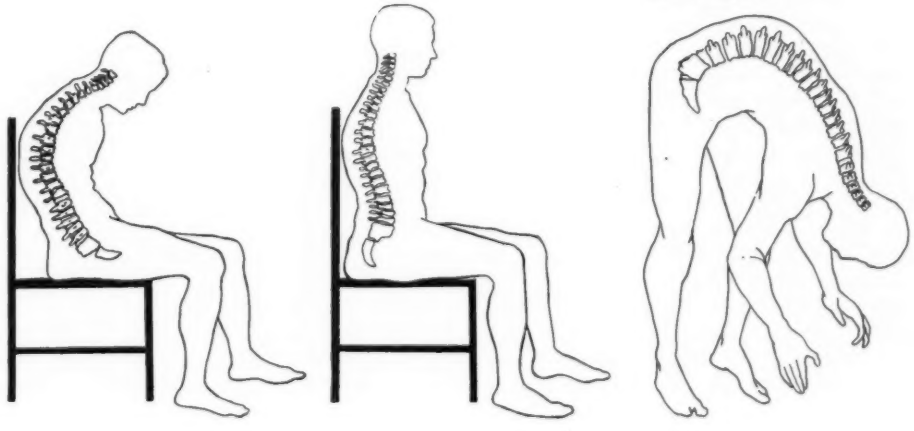
In the drawing in figure 12, the incumbent body weight is transmitted to the lumbosacral area. Obviously there is more strain on the posterior longitudinal ligament and the interspinous ligaments than elsewhere. Because of this brake-shoe at the back, the remainder of compression due to body weight must compress the disk anteriorly. This is an abnormal amount of pressure, particularly if it is sustained for any length of time. It is well known that the disk acts as a shock absorber and will take care of a quick bump just as a hydraulic shock absorber will; but in a persistent, continued position the fluid tends to equalize in a different way, even to the point of absorption. Thus improper sitting is one of the things that may initiate degeneration of a disk, and it certainly can perpetuate it. Proper sitting is important. In a soft, deep upholstered chair one must sit the way this drawing indicates; it is impossible to sit up straight. That is why deep-cushioned davenports should all be burned, in my opinion.

Figure 13 shows the proper way to sit. Many persons who have chronic low backache have a major part of their trouble in trying to drive a car. Adjusting the seat of an automobile properly is not a matter of tilting or of back-

FIGURE 12. Improper sitting posture may initiate disk degeneration, and certainly can perpetuate it.

FIGURE 13. The proper way to sit.

FIGURE 14. This position should be avoided at all costs. It will aggravate disk deterioration and may actually begin it.



and-forth positioning, but depends on how well the low back is supported. Most of us "scootch" down in our seats, as shown in figure 12. If you maintain this position for a long time driving a car, you end up with a backache. If you sit straight, perhaps with some support behind the back at the level of the belt, such as a cushion, you will not have undue strain and will not have pain in the back after a trip. I cannot overemphasize the importance of a proper sitting posture.

The position shown in figure 14 is one we all assume frequently. Housewives assume it innumerable times a day picking up after the youngsters. It places enough strain on the lumbosacral disk—just this position alone, with the hamstrings tight, the superincumbent weight acting through the hinge (the lumbosacral junction)—to increase the compression on this space alone four or five times. Persisted in day after day, this position not only is apt to aggravate deterioration but can actually begin it. This accounts for the frequency of low back pain among housewives and in many industrial areas. This is a position to be avoided at all costs. It is not a natural one for upright bipeds. A monkey bending forward always bends the hips and knees. We should do likewise. Bending the hips and knees places the strain at the hip as the hinge rather than at the lumbosacral disk, and is enough to prevent deterioration or to allow it to heal rather than progress.

The patient with low back pain must be trained and must understand precisely what we are attempting to do to control the pain. This takes a little time, and we as doctors default, I believe, many times in spending insufficient time to illustrate exactly what we are trying to accomplish.

Proprioceptive Sense of Back Muscles

Another factor that deserves mention here is the proprioceptive sense of the muscles that control the back. One does not stop to think about one's back when bending over to pick up a lady's handkerchief. The muscles have been accommodating to this type of movement so long that a secondary proprioceptive sense has developed. Take the same picture and try to change it in any way and you must redevelop a new proprioceptive sense. I would venture to say that the average physician in this audience, if he were to stand up, would have trouble describing the degree of lordosis he has at that moment. This, again, is a loss of proprioceptive sense. To redevelop it takes more than just instruction. This is where I feel a low back brace is extremely helpful. A low back brace in the form of a metal support (not a corset) to be worn long enough to redevelop this proprioceptive sense gives the patient a guide. The back can be brought to touch the brace, and by doing this repeatedly the back develops its own proprioceptive sense and the brace then can be discarded. The brace is intended not to support the back but to redevelop this proprioceptive sense in the proper use of the back. The average period required to do this, in my opinion, is four to six months, and some patients will be unable to develop it. They are incoordinated from the beginning, and present another problem.

What to Do for Acute Backache

Acute backache is the type that most of you see in patients' homes. Many times you are called because someone is unable to get out of bed, or even to make it to bed. You may find the patient lying on the floor. What do you do about it? In this situation I believe you need to make only a cursory examination. Be sure the patient can move both legs, can dorsiflex the feet and toes, and has sensation and reflexes. In other words, rule out any acute expanding neurologic lesions which would need immediate compression. Having ruled these out, the diagnosis is relatively unimportant for the time being. Keep the patient at bed rest to get over the muscle spasm. If it is a plain backache due to mechanical derangement, frequently the patient will be completely well after 48 hours of bed rest and good sedation and a little heat on the back. The best weapon we have to combat manipulative treatment is bed rest, and if the patient has repeated attacks he soon learns this for himself.

If the pain persists beyond 48 hours, it is up to you to establish a diagnosis, if you can. This requires more detailed examination,

sometimes even hospitalization, certainly x-rays, and perhaps some of the other tests, even myelograms or discograms. These latter tests, I think, should be in the hands of someone experienced in performing them and in interpreting the films. Many times it will still be found that the cause is degeneration of the disk, and the patient will be returned to you for the kind of care already outlined.

Treatment of Ruptured Disk

In my own practice, about one-tenth of all the patients with backache have disk surgery. This does not mean that perhaps more should not have had operation. It could even mean that I operated on some who should not have had surgery, but it gives a perspective of the status of ruptured disk in relation to the whole problem of low back pain. It really is an insignificant part of the whole problem. Nonetheless, when it occurs it is more acute and persistent than the other conditions. As far as I am concerned, there are only two indications for surgical treatment of ruptured disk. The majority of cases, even with nerve signs, will clear up spontaneously if the patient is willing to withstand the discomfort for up to six months. The two reasons to operate are (1) if the patient demands it for relief of pain and (2) if there are progressive neurologic signs indicating increasing damage to a nerve root.

In regard to the first indication, one must evaluate the patient before accepting his demand for an operation. If I had a terrific amount of pain and insisted that something be done to relieve it, and the only thing left to do was to operate, that would be an acceptable indication. The second indication for operation means that you must make weekly, if not daily, neurologic examinations to find out if there is progression. Many patients will elect to have conservative treatment knowing that the possibility of a favorable outcome without surgery is in the range of 80 per cent.

I mentioned the indications for operative treatment of ruptured disk because often we are apt to think that it is mandatory to operate in such cases, and this is certainly far from true.

Exercise in Treatment of Low Back Pain

After an extensive survey of this question, we have found that normally the ratio of strength of back muscle to abdominal muscle is about three to one. Whenever there is a deviation from this ratio, that person is in line for a backache. We frequently find a ratio of, say, six to one, and such a person can be expected to have a backache in the very near future. We therefore try, in all chronic back problems, to re-establish this ratio of three to one for strength of back muscle to abdominal muscle, and more times than not this requires strengthening mainly the abdominal muscles. After all, the abdominal muscles are the mainstay of the spine, and if they are weak we must do something about it. The mode of living today is very conducive to the development of weakness of the abdominal muscles. A very simple exercise to strengthen the abdominal muscles is just to lie on your back on the floor with your feet under a radiator or some other immovable object and do sit-ups without using the hands. You cannot do this with a painful back, and therefore the pain must be treated first. When the patient has reached the point where he is relatively comfortable most of the time, he can start exercises.

I think the average practitioner can handle the average case of backache up to a point, and this point will be reached in a very few of the total number of backaches.

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